



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106949/2019

Hearing held at Dundee on 19 February and 9 November 2020

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Employment Judge I McFatridge

15 **Mr K McIntosh**

Claimant
Represented by:
Mr Russell,
Solicitor

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20 **Pankhurst Decorators Limited**

Respondent
Represented by:
Mr McGuire,
Advocate
Instructed by
Mr S Allison,
Messrs Blackadders

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondent. The claim is dismissed.

REASONS

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1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. The respondent submitted a response in which they denied the claim. It was their position that they had not dismissed the claimant but that the claimant resigned his employment in circumstances which did not amount to a fundamental
E.T. Z4 (WR)

breach of contract by the respondent. A joint bundle was lodged by the parties in advance of the hearing. On the morning of the hearing the claimant sought to add certain additional documents to this including an updated schedule of loss. The respondent consented to these documents being lodged with the exception of pages 126-127 which were said to be extracts from the claimant's diary. The respondent objected on the basis that they had not seen the full diary from which the documents were said to have been extracted. They also objected that these had been lodged very late in the day in that the respondent's agent had only been sent copies at 5:00pm the previous day. At the end of the day I agreed to allow the documents to be lodged on the basis that I would require to decide what weight to give to the documents in light of the evidence of the claimant and his cross examination. I should also record that the respondent indicated to me that Mr Pankhurst Senior who was a key witness in the case was unwell and unable to attend on 19 February. They sought an adjournment however I refused this on the basis that I would be able to ascertain once I had heard the rest of the evidence whether or not Mr Pankhurst's evidence was indeed essential to the case.

2. The case commenced with the claimant giving evidence on his own behalf. Samantha Hall the respondent's Office Administrator then gave evidence on behalf of the respondent. At the close of her evidence it was clear that the Tribunal required to hear the evidence of Mr Pankhurst. I accepted that he was unwell. The hearing adjourned and was due to recommence on 20 March 2020. Unfortunately, on that date Mr Pankhurst was still unwell. Thereafter there was correspondence between the parties regarding the listing of the final day of the case. By this time the Covid pandemic had broken out and the tribunal was unable to hold face to face hearings. The respondent's position was that it would not be practicable for Mr Pankhurst to give his evidence using the Tribunal's online CVP system. Eventually the hearing recommenced on 9 November when Mr Pankhurst gave his evidence and the parties made final submissions. On the basis of the evidence and the productions I found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

3. The respondent are a firm of painters and decorators. They were established by Mr Pankhurst in or about 1981. The claimant is a Painter and Decorator by trade. He has been in the painting and decorating trade 56 years and has considerable experience. Mr Pankhurst and the claimant have been acquainted with each other for a period in excess of 40 years. They worked together at some point during the 1970s. The claimant commenced employment with the respondent firm on 1 January 2002. The claimant's statement of terms and conditions dated 29 May 14 was lodged (pages 29-34). The respondent also has a company handbook which was lodged (pages 71-116). The claimant normally worked 39 hours per week. When he started out in employment the claimant drove to and from jobs. At some point he ceased driving and either travelled to jobs on public transport or got a lift from Mr Pankhurst or one of the other painters and decorators. At or about the time of the claimant's dismissal the respondent firm employed eight painters and decorators. The respondent had a large contract with Perth College from which they derived a considerable amount of work. They also did private work. The claimant was mainly involved doing private work and mainly did wallpapering.
4. Over the years there were times when Mr Pankhurst would fall out with various employees including the claimant. Sometimes Mr Pankhurst would shout. Mr Pankhurst's view of the claimant was that the claimant was an extremely good painter and decorator but that like everyone he sometimes made errors and Mr Pankhurst felt that the claimant bitterly resented it when he was pulled up for anything. On occasions a situation would arise where an employee would fall out with Mr Pankhurst and walk off a job or walk away. Mr Pankhurst's usual practice was to wait a few days for that person to cool off and they would then come back to work. Mr Pankhurst's view was that this was something which happened in the building trade. Individuals would be working long hours in close proximity with each other. They would often see more of their workmates than their families. It was inevitable that there would sometimes be fallings out.

5. The respondent utilised a firm of HR consultants to provide them with HR advice and who had assisted them in producing conditions of employment and their company handbook. At some point some years before 2019 the claimant had been taken through a disciplinary process by the respondent and had received a warning. This warning was spent well before 2019.

6. At one point in 2017 there was an altercation between Mr Pankhurst and the claimant which related to work the respondent had carried out at Perth College. Mr Pankhurst had received a complaint that paint had been trailed through parts of the college on someone's shoes. He asked the claimant to attend the college and sort this and also asked him to ensure that the job was protected so that paint spills could not happen. The claimant took umbrage at this. He told Mr Pankhurst that he had not been the person responsible for paint trails and would not deal with it and did not attend work following an argument with Mr. Pankhurst on 17 August 2017. On 21 August 2017 he wrote a handwritten letter to the respondent which was lodged (page 36).

7. It stated

“Regarding my dismissal from your employment on 17th August, 2017, I am notifying you of my intention to appeal against the same. Please send in writing, your reason for my dismissal to the above address at your earliest convenience.”

The respondent sent a response to the claimant which was signed by Mr Pankhurst Senior.(p37)

“Further to your letter dated 21st August 2017, I would like to invite you to a meeting on Monday 28th August 2017 at 1.00pm at the offices of Pankhurst Decorators.

We had a discussion on Thursday 17th August 2017 with regard to work conducted at Perth College following a complaint received about the work you had carried out. At no time was it intimated that you were dismissed from your employment with Pankhurst Decorators. I had expected you to attend for work on Friday 18th August 2017 but you failed to attend on this day or on Monday 21st August 2017.

I was surprised to receive your letter on Tuesday 22nd August 2017 stating that you intended to appeal the decision of your dismissal when this has not occurred. Samantha Hall of Pankhurst Decorators contacted you on Wednesday 23rd August 2017 to discuss your letter and you agreed that you would contact me on Thursday 24th August 2017 to discuss matters, I have not heard from you. Therefore, I would like to meet with you to discuss matters.

You are entitled to be accompanied at the meeting by a fellow work colleague or an accredited trade union representative. Can you please confirm your attendance at the meeting by contacting Samantha on....”

8. The claimant thereafter returned to work.
9. Mr Pankhurst's role within the business involves him providing estimates and quotations for new work and also making arrangements as to where each painter and decorator is working on a daily basis. He requires to ensure every painter and decorator has the appropriate materials and tools such as scaffolding to do each job. On Tuesday 29 January 2019 the claimant was working at a painting and decorating job in an empty house in Stormont Avenue, Scone. Mr Pankhurst understood that the claimant would require to continue working on the job in Stormont Avenue on the following day 30 January. He would normally expect that if the claimant was making good progress and expected to be finished a job then he would advise Mr Pankhurst in advance so that Mr Pankhurst could make arrangements for him to be moved on to the next job. He would also normally expect that if there was only a small amount of work to be done to finish a job that a painter and decorator would proceed to finish the job by the end of the day rather than come back for a short time the following day.
10. The respondent's office and store is in Scone. Mr Pankhurst also lives in Scone. It has been his practice for many years to attend a business breakfast at the Murrayshall Hotel, Scone every Wednesday morning from around 6:30am to 8:30am. He has his phone with him at this meeting so he can respond to any calls or text messages. On the morning of 30 January Mr Pankhurst attended the business breakfast as usual. It

finished around 8:30. He did not receive any telephone calls or texts during the breakfast but immediately thereafter he received a call from Darrion Eley, one of his employees who was currently working on a job in Blairgowrie. Darrion advised Mr Pankhurst of a difficulty which had arisen with this job and Mr Pankhurst agreed that he would drive to Blairgowrie (a distance of around nine miles from Scone) in order to attend at the job and deal with the problem.

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11. Mr Pankhurst arrived at Blairgowrie at around 9:10. He then received a call from the claimant who advised him that he was finished the job at Stormont Avenue in Scone. Mr Pankhurst was annoyed. He was annoyed firstly because he felt the claimant could have told him the previous day that he was likely to be finished early the following morning. He was also annoyed because instead of phoning him an hour or so before he was finished so that Mr Pankhurst could have made arrangements to have him picked up and put on another job he had waited until he was absolutely finished and had packed up the job before phoning. Mr Pankhurst was also annoyed because he had just travelled from Scone to Blairgowrie and would now require to travel back to Scone to pick up the claimant.

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12. Mr Pankhurst did not have any work lined up for the claimant to do but he asked the two of the employees who were working in Blairgowrie if they had jobs which the claimant could help with. They agreed that they did. He asked them if it would be okay for the claimant to use their tools (brushes and rollers). They said that this would be fine. The reason for this was that the respondent did not want to potentially have to come back to Blairgowrie to pick up the claimant's tools and take them back to Scone. He knew they would be required in Scone the following day for a job.

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13. Having told the two workmen that the claimant would be coming to help them Mr Pankhurst then drove from Blairgowrie to Stormont Avenue. He arranged for one of the workmen, Darrion Eley to follow in his van so that he could convey the claimant back to Blairgowrie.

14. Mr Pankhurst arrived at Stormont Avenue. The claimant was waiting outside having a cigarette and had taken out all of the materials and his tools from the job. The claimant stopped and put the tools and materials

in his van. He asked the claimant why the claimant had not given him some warning. The claimant told Mr Pankhurst that Mr Pankhurst was only just up the road. Mr Pankhurst said that he wasn't. The claimant then told Mr Pankhurst that he didn't know what he did on a Wednesday.
5 Mr Pankhurst then said to the claimant "I have had enough, just go with Darrion."

15. At this point Darrion was parked in his vehicle just a few yards up the road behind Mr Pankhurst's vehicle. Mr Pankhurst's intention was that the claimant should go with Darrion to the job in Blairgowrie and work at the
10 Blairgowrie job that day. Mr Pankhurst then left expecting the claimant to get into Darrion's vehicle behind him.

16. The claimant did not get into Darrion's vehicle, instead he walked away and caught a bus home.

17. Mr Pankhurst became aware of this around 10-15 minutes later when
15 Darrion called at the respondent's premises in Scone. He said he was calling in to pick up washer fluid for his vehicle. He told Mr Pankhurst that the claimant had just walked away and had not got into his vehicle. Darrion then went back to the job in Blairgowrie.

18. Mr Pankhurst's assumption was that the claimant had been upset at
20 having been upbraided about what Mr Pankhurst considered to be his unprofessional and inconsiderate behaviour. Mr Pankhurst thought the claimant had taken the huff and had walked away as he had done previously. Mr Pankhurst's initial view was that he would deal with this in the same way that he had dealt with the claimant and others in the past
25 by simply ignoring it for a few days so as to allow the claimant time to cool down.

19. The claimant did not attend work again on the Thursday or Friday.

20. All of the respondent's painters and decorators are hourly paid. The payroll is done by Samantha Hall. On the Friday, 1 February,
30 Mr Pankhurst told her that the claimant had not been at work since early on the Wednesday morning. It was entirely normal for employees to only be paid for the hours they had actually worked. If they did not work the

hours they were not paid for them. Accordingly, Ms Hall processed the payroll on the basis that the claimant had worked Monday, Tuesday and for an hour or so on Wednesday. Ms Hall's understanding was that the claimant would be coming to work as normal the following week.

5 21. During the course of the weekend, Mr Pankhurst suffered a fall whilst he was walking his dog on a golf course in the dark. Mr Pankhurst did not at first understand that he had been injured. The following day he felt extremely debilitated. He was unable to sleep due to the pain in his wrist. He did not seek medical attention straight away but did so the following
10 week. Eventually, Mr Pankhurst underwent various tests and was advised that although the direct injuries from the fall would not explain how he was feeling, it would appear that the shock of the fall exacerbated a condition called carpal tunnel syndrome. Mr Pankhurst required to have an operation for this which took place in or about April. As a result of his
15 illness Mr Pankhurst describes his ability to contribute to the business during the period from 3 February onwards as being below par. He considered that he was unable to concentrate fully on his business affairs. This was noted by his colleague Samantha Hall.

22. The claimant did not attend work on 4 February. He did not seek to contact
20 Mr Pankhurst. On 8 February the claimant, who does not have his own e-mail account, arranged for his wife to send an e-mail to the respondent from her e-mail account. The e-mail was lodged (page 38). It was sent on the claimant's instructions. It stated

25 "Further to your conversation on Wednesday 30th January 2019, I would like clarification on the wording 'I've had enough of you just go'. This can only mean one of two things. Either suspension, for which you are duty bound by employment law to pay me in full for the time of said suspension, or an unfair dismissal. You have 7-14 days on receipt of this email to make written contact regarding this matter.
30 Yours faithfully, Kenneth McIntosh."

23. Following this e-mail Mr Pankhurst had a telephone conversation with the claimant on 12 February. He advised the claimant on that date that the claimant had not been dismissed and that he was expecting him back at

work. He arranged for the claimant to attend at the office on Thursday 14 February in order to discuss matters.

24. At the meeting Mr Pankhurst apologised for not having been in touch before but advised that he had been in an accident. The claimant's response was that he did not care. Mr Pankhurst asked him if he would be coming back. The claimant's response was "I don't know". Mr Pankhurst told the claimant that 'all the guys were wanting him back' and 'why didn't he come back and draw a line under things'. The claimant did not respond to this. Mr Pankhurst then said that he would see the claimant Monday morning. The claimant said "I'll see."
25. The claimant did not turn up for work on the Monday 18 February. He did not contact the respondent. On 21 February the respondent wrote to the claimant. The letter was lodged (page 39). It stated

"Re: Absence from work without notification

Following our discussions on Thursday 14th February 2019, I expected you to be back at work on Monday 18th February 2019. However, you failed to attend or notify us of your absence. To date I still do not have any notification or substantial reason for your absence.

As you are aware, you are required to notify us of your inability to attend work as outlined in the Absence Policy and Procedure. We are concerned about the reasons for your non-attendance at work.

Please contact me immediately to discuss the reasons for your absence and failure to notify us, and your expected return date. This absence must be discussed prior to you recommencing work."

26. On or about 28 February a telephone conversation took place between the claimant and Samantha Hall the respondent's administrator/receptionist. She asked the claimant why he had not been at work. The claimant told her that he had been sacked. Ms Hall assured him that this was not the case. Ms Hall assured him of this on more than one occasion during the call however the claimant maintained in the telephone call that he had been sacked.

27. On 28 February the respondent wrote to the claimant. This letter was lodged (page 40). They stated

“Dear Kenny

Thank you for making contact with Samantha this morning and confirming receipt of my letter dated 21st February (copy attached).

5 I would like to invite you to a meeting on Tuesday 5th March 2019 at 2.00pm at the offices of Pankhurst Decorators.

The reason for the meeting is to discuss your absences from work as you were expected to return on Monday 18th February 2019 following our previous discussions of Thursday 14th February 2019.

10 You are entitled to be accompanied at the meeting by a fellow work colleague or an accredited trade union representative. Can you please confirm your attendance at the meeting by contacting Samantha on 01738 553351 on Tuesday morning.

Yours sincerely”

28. The claimant did not contact the respondent to arrange a meeting.
15 Instead, the claimant’s solicitors wrote to the respondent on 1 March 2019. Their letter was lodged (page 41).

“We refer to the above and to your letter dated 21st February 2019 to our client. We are extremely surprised by the terms of your letter.

20 You dismissed our client by the side of the road on 30th January 2019. You failed to provide him with work thereafter and not responding to his email on Friday 8th February 2019.

On the basis that you terminated our client’s employment which is clear from your actions and broke his service, our instructions are clear to pursue a claim of unfair dismissal.

25 This is not the first time you have dismissed our client in the circumstances and our client is not willing to take any further chances you will treat him in this way again. Our client has lost trust and confidence in you as an employer. We will be in touch in due course in respect of Employment Tribunal proceedings.”

30 29. On 4 March Ms Hall contacted the claimant by telephone and asked him to phone Mr Pankhurst to discuss matters. The claimant said that he was not prepared to do so and that it was up to Mr Pankhurst to phone him.

30. The claimant commenced work on a casual basis with another firm of painters and decorators in the Perth area. He contacted Ms Hall on or about 17 May 2020 and advised her that he had a new job and asked her for his P45. After speaking to Mr Pankhurst Ms Hall indicated that they were not prepared to send out his P45 but wanted him to come in and discuss matters with Mr Pankhurst. The claimant refused to do this and became argumentative with Ms Hall. The P45 was eventually sent to the claimant in or about June.
31. Mr Pankhurst and the claimant met by chance in the street on two occasions. On one of these occasions Mr Pankhurst raised with the claimant the possibility of settling the Tribunal proceedings which were by then underway. He indicated that the respondent did not have the kind of money that the claimant was looking for and that the claimant's actions risked putting others out of work. Mr Pankhurst's understanding was that the claimant had agreed a figure with him but very shortly thereafter the claimant's representatives wrote to the respondent's representatives indicating that they considered Mr Pankhurst's approach to have been completely inappropriate and the claim could not in any way be regarded as settled.
32. Since the claimant's employment terminated the respondent has not replaced him. Subsequent to the termination of the claimant's employment the respondent lost the contract with Perth College which was a substantial source of business for them.

Matters arising from the evidence

33. In this case there was a sharp difference in the evidence of the claimant and the evidence of Mr Pankhurst which I required to resolve. The claimant's position in evidence was that on the day in question he had contacted Mr Pankhurst to say that he was finished the job and needed picked up. His belief was that Mr Pankhurst would pick him up and take him to another job. He said that Mr Pankhurst turned up and then a few seconds later Darrion Eley had turned up in another vehicle. He described Mr Pankhurst as being angry and asked him why he had not finished the job the previous night. The claimant says he responded to say he had not

had time. The claimant's position is that Mr Pankhurst then said I've had enough of you just go. The claimant's position is that he then gave Mr Pankhurst a hand to put materials in the van. It was his position that Mr Pankhurst had tried to take his tool bag out and give it to him and that the claimant had said he couldn't carry it himself and to put it in the store. The claimant said Mr Pankhurst said he would just leave it outside the store. The claimant said that he had asked to put the bag in the store but Mr Pankhurst had said that it was his store and the claimant wasn't welcome to put items in the store. The claimant in his evidence referred to two pages which had been lodged the day before the hearing which he said were excerpts from a journal. With regard to the events in question the entries said

“Phoned M.P. at 9.15 to inform him now finished so he could pick me up and take me to new job perfectly normal procedure (many time B.4). M.P. then told me to go home (no reason given). He also stopped me from going to office and also told me that my tool bag would not be put in the store as this was his premises and my tool bag would be left outside.”

The claimant's evidence was that it was 'blatantly obvious' that he had been dismissed. He accepted that Darrion Eley had been brought along but could not give any explanation as to why Darrion had been brought along and did not give any account of any conversation he had with Darrion.

34. Mr Pankhurst's evidence about what took place was as set out in the findings in fact which I have set out above.

35. I considered that on the basis of the balance of probabilities it was more likely that matters had occurred in the manner set out by Mr Pankhurst than that of the claimant. Both the claimant and Mr Pankhurst were subject to fairly intense cross examination. Mr Pankhurst stood up to the cross examination well. He made appropriate concessions but in general terms he was able to provide a logical explanation for his actions. His evidence also concurred with that of Ms Hall who I considered to be an independent witness. I found her to be credible and reliable.

36. The claimant on the other hand was not an impressive witness. He was not prepared to make appropriate concessions and could not provide any real explanation for the inconsistencies in his position which were pointed out by the respondent's representative. In particular, he could not say why he was now absolutely certain that he had been dismissed on 30 January whereas in the e-mail sent on 8 February he was not sure. He sought to distance himself from the terms of the e-mail by saying first of all that it had been sent by his wife and then that she had had the terms of the e-mail dictated to her by ACAS. He could not explain why the e-mail he sent on this occasion was unclear about whether he believed he had been dismissed or not whereas the e-mail he sent in 2017 was quite categorical in stating that he had been dismissed albeit he had gone back to work without demur following the conversations from the respondent confirming that he was not dismissed. His position in evidence was that the previous occasion was a misunderstanding which Mr Pankhurst and him had resolved.

37. The claimant changed his evidence as to whether he had said that he had told Mr Pankhurst that he was finished the job or nearly finished. Initially, his position was that he was not totally finished and that Mr Pankhurst had no right to be annoyed. He then accepted that he had called to say that he was actually finished. He denied that Mr Pankhurst had reminded him that it was best to call in advance of finishing. He accepted that Darrion had come along in a separate vehicle from Mr Pankhurst to the place where he was working. He accepted that he had seen this and that he understood that the reason for Darrion coming was to take the claimant to another job. He accepted that his tools had been taken to the store despite his position being that Mr Pankhurst had specifically refused to take them to the store and had said he would be leaving them outside.

38. He could not explain why the words which he alleged had been said by Mr Pankhurst in his ET1 were

"I'm just fed up of you, just go"

whereas he now said that the words used by Mr Pankhurst were

"I've had enough of you, just go".

Whereas in the document he said was a contemporary note he says Mr Pankhurst told him to

“go home”

5 He accepted that he had no reason to believe that if he had told Darrion that he was going to the Blairgowrie job with Darrion that Darrion would have refused. He then accepted that Mr Pankhurst may have thought that he was going to the new job with Darrion. Despite this, he later in his cross examination denied that there had been any suggestion he go with Darrion.

10 39. At the end of the day my view of the evidence was that Mr Pankhurst's position was correct and that the claimant had taken the huff on the day at being upbraided for not phoning in an hour or so before the job was finished. I did not accept that any words of dismissal had been spoken by Mr Pankhurst. I did not consider that the words spoken by him were in
15 any way ambiguous in the sense that they could have been interpreted as words of dismissal. Mr Pankhurst had asked the claimant to go with Darrion. Darrion had driven 10 miles from Blairgowrie to Scone for the sole purpose of picking up the claimant and taking him back to the job in Blairgowrie. I thought it highly unlikely that Mr Pankhurst would have
20 brought along Darrion if that was not his intention. It did not appear to me at all likely that Mr Pankhurst had lost his temper when he saw the claimant and uttered words of dismissal. Mr Pankhurst has been in business since 1981. He employs 8 people and although this is a fairly small firm, still utilises the services of an HR consultant on retention. The tribunal was
25 given no details of the previous disciplinary process against the claimant but it does indicate that Mr Pankhurst does have some awareness of the need for disciplinary processes. It seemed to me highly unlikely that a businessman with this knowledge would dismiss someone on the spot. Furthermore, the behaviour of the parties afterwards is indicative of the
30 claimant wishing to bolster a claim for compensation for unfair dismissal rather than Mr Pankhurst seeking to backtrack on what he had said. The claimant's representative was critical of the fact that Mr Pankhurst had taken the claimant's tools away to the store. Mr Pankhurst's explanation for this was that the claimant would not need his tools for the job in

Blairgowrie and he wanted them back in Scone the following day. I considered this a perfectly acceptable explanation. The claimant's representative was critical of the fact that Mr Pankhurst had not taken more active steps to contact the claimant after he failed to turn up for work on 4 February. Mr Pankhurst's explanation was that, as related above, he had suffered a fall over the weekend following the incident. He described his performance as below par that week. This was confirmed by Ms Hall. I considered that his explanation had a ring of truth about it. It appeared to me that the claimant was a difficult, stubborn employee and it is perfectly understandable that Mr Pankhurst did not wish to seek out what was probably going to be a difficult conversation in a period when he was struggling to deal with other more pressing matters. I also considered Mr Pankhurst's explanation that this was something which happened from time to time and the best thing is to wait until tempers have cooled had the ring of truth about it at least in his own mind.

40. I should also say that I gave little weight to the documents which were lodged late in the day and were said to be extracts from the claimant's diary. The diary document was not lodged. I did not consider it to be established that these were contemporary notes. The only document which was definitely contemporary and evidences the claimant's state of mind is the email sent on 8 February which said that the claimant was not sure whether he had been dismissed or not.

Discussion and decision

41. The sole issue to be determined by the Tribunal was whether or not the claimant had been unfairly dismissed by the respondent. The respondent did not accept that the claimant had been dismissed at all therefore the first step was to determine whether or not a dismissal had taken place. I should say that at an early stage in the hearing the claimant's representative confirmed that he was relying solely on there having been an overt dismissal. It was no part of his claim that the claimant had been constructively dismissed.

42. Both parties made full submissions. The claimant's primary position was that the words spoken were unequivocal, unambiguous words of dismissal

and their secondary position was that even if the words spoken were ambiguous then the conduct of the parties afterwards, particularly the failure of the respondent to contact the claimant, showed that, taking the multi-factorial approach recommended in the prior case law the Tribunal should make a finding that a dismissal had occurred. The respondent's position was that no words which could be construed as a dismissal had been spoken whatsoever. If the Tribunal were against them on this then their position was that the words spoken were clearly ambiguous - as could be seen from the fact that the claimant's e-mail of 8 February demonstrated that the claimant believed the words he claimed to have been said to be ambiguous - then the Tribunal should find on the basis of the party's subsequent conduct that no dismissal had taken place. The respondent's position was also that if the Tribunal were against them on this, then a finding should be made that the claimant had failed to mitigate his loss by accepting the offer of a return to work which both parties were in agreement had been made on 12 February 2019.

Discussion and decision

43. This case to a large extent turned on the factual findings which I have set out above. I have preferred the evidence of Mr Pankhurst and my clear view is that no words of dismissal were spoken. The claimant was not dismissed. The claimant was instructed to go with Darrion. He was supposed to go with Darrion to the job in Blairgowrie. Mr Pankhurst did not say any of the three versions of what he was alleged to have said by the claimant. That is enough to dispose of the case.

44. I should however say that even if I had been persuaded that the words which had been spoken were any of the versions those attributed by the claimant to Mr Pankhurst I would still not have found that a dismissal had taken place in this case. I considered that the words "I've had enough of you, just go" or "I am fed up with you just go" spoken in circumstances where the respondent had made arrangements for a vehicle and driver to be there to drive the claimant to the next job and where the claimant was aware that that was why the vehicle and driver were there could not in any way be described as unambiguous words of dismissal. Even if I had found these were the words spoken (which I did not) and had I been persuaded

that these were ambiguous I considered the issue would have been resolved by the fact that Mr Pankhurst clearly advised the claimant on 12 February that he was not dismissed and this was confirmed at the meeting on 14 February and again in the letter sent on 21 February. I did not consider that the fact the claimant was not paid for 31 January and 1 February when he did not attend work to be of any assistance to the claimant given Ms Hall's evidence that the respondent's payroll always operated in this way and that employees were only paid for the hours worked. I did not consider that the delay in Mr Pankhurst contacting the claimant strengthened the claimant's case that he was dismissed given the explanation for this given by Mr Pankhurst. The outcome of the case is that the claim is dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Ian McFatridge
25 November 2020
25 November 2020