EMPLOYMENT TRIBUNALS

Claimant: **Mr Graham**

Respondent: **Thorn Plant Hire Limted**

Heard at: **Watford Employment Tribunal (By CVP)**
On: **23 April 2021 and 15 June 2021**

Before: Employment Judge Cowen

Representation
Claimant: Mr Graham , In person
Respondent: Ms DeSouza, paralegal

RESERVED JUDGMENT

1 The claimant's claim for detriment arising from the flexible working request is dismissed.

2. The claimant's claim for failure to provide written terms and conditions is upheld and the respondent must pay the claimant **£752**.

2. The Claimant's claim for unfair dismissal is upheld. The respondent shall pay the claimant a total amount of **£12,730.**

3. A prescribed element of **£11,590** to be withheld by the respondent pending recoupment of benefits and a balance of **£1,140** to be paid immediately.

REASONS

Introduction

1. Firstly, I must apologise to the parties for the delay in sending this decision and I regret any difficulty caused by the length of time which has elapsed in waiting for this judgment.

2. The claim was issued by the Claimant on 18 May 2020 for unfair dismissal, detriment under the Flexible Working Regulations and failure to provide written terms and condition of employment. The response denied that the

claimant had been unfairly dismissed.

3. The hearing was heard by CVP online video hearing. It was heard over two days; on 23 April and 15 June 2021. The Claimant represented himself and Ms De Souza represented the Respondent throughout.

4. I received witness statements from the Claimant, Mr Dean Speirs, Mr Joe Bray and Mr Paul Brewin and on behalf of the Respondent, I received statements from Mrs Kim Pritchard, Mr Liam Gillespie, Ms Pam Murphy and Mr Barry Austin. I did not allow the witness statement of Ms Gemma Tracey to be submitted in evidence as it was filed late (the day before the hearing), was not going to be supported by live evidence and the respondent had been aware of the relevance of her evidence prior to the day before the hearing, as they had included relevant documents in the bundle. The prejudice to the claimant of including her evidence at short notice, when he was not represented and it could not be tested in cross examination outweighed the prejudice to the respondent of not being allowed to rely upon it.

5. I allowed the late submission of documentary evidence by the Respondent of a copy of a contract of employment and 4 photographs of the jig which it was said that the claimant had made for a competitor.

6. I heard live evidence from Mrs Pritchard and Mr Gillespie for the Respondent and Mr Bray and the Claimant on his behalf.

The Facts

1. The claimant commenced work for the respondent on 12 March 2012, working initially as a yardsman and subsequently as a welder. The claimant did not recall signing or being given a contract of employment, neither did Mr Bray. A contract dated 7 June 2012 was shown to the Tribunal with the claimant's signature.

2. The claimant's son was born on 3 April 2018.The claimant booked time off to spend with his partner. Unfortunately, the baby suffered complex health conditions and was initially in hospital for eight months. The respondent was sympathetic to the claimant and paid him for three weeks of leave. They subsequently agreed that he could work one hour less per day in order to be able to travel to the hospital and allowed him to take unpaid leave at times when his son underwent surgery. The claimant was grateful for these allowances.

3. The claimant kept Mrs Pritchard informed of the progress of his son, by sending regular text messages. He did so as he thought his colleagues had genuine concern for himself and his son and also to keep his employer abreast of the situation. Whilst Mrs Pritchard was initially interested and concerned, she came to see these texts as a nuisance and the claimant asking for further favours and help.

4. In April 2019 the claimant requested to temporarily work for 3 days per week, due to problems with finding suitable childcare for his son. This was agreed by the respondent. The arrangement was never referred to formally

as a flexible working arrangement and no written agreement was reached.

Detriment

5. Around July 2019 there was a change of personnel in the respondent. A director of the company retired/left. This meant Mrs Pritchard's position altered and she had fewer directors to answer to in relation to her handling of the staff.

6. In late July 2019, Mrs Pritchard informed the claimant that the respondent wished to employ another welder to cover the other two days per week not being worked by the claimant. The claimant believed that he was managing all the work on three days per week and therefore there was no need for another welder. The respondent sent the claimant a letter on 17 July to formally set out the flexible working arrangement he had had since April. The wording of the letter made it sound to the claimant that this was a new arrangement, although it had in fact been in place since April 2019. This indicated a change of attitude by the respondent toward the claimant, by making his flexible working more regulated. Mrs Pritchard agreed in her oral evidence to the Tribunal that she could not find someone to work as a welder for two days per week.

7. Mrs Pritchard also removed the claimant's special dispensation to allow him to carry his mobile phone. Until this point, the claimant had been allowed to carry his phone, in case he was needed urgently to speak to the hospital with regards to his son's condition. This was on the basis that his wife was not a native English speaker and therefore the technical, medical language was difficult for her to handle. The claimant was told that from then on, he could be contacted via the office in the same way as other staff. This too upset the claimant, who felt that the respondent was no longer as supportive and sympathetic of his family's situation and that Mrs Pritchard was rude towards him.

8. Mrs Pritchard also stopped engaging with the claimant's text messages to update his employer on his son's welfare. This too was taken by the claimant to be a sign of a lack of support for him. He became increasingly anxious as a result of this treatment by the respondent. However, the working arrangement remained the same. The claimant continued to work reduced hours.

9. At this point Mrs Pritchard also started asking other staff not to stop during working hours to speak to the claimant about his son. Mr Bray was told not to have personal conversations with the claimant during work time.

10. The whole company closed for the Christmas holiday in 2019 and returned to work on 6 January 2020. During the holiday period Mrs Pritchard was informed by James Rice that the claimant had made a spanner and a jig for a competitor company. She waited until the company reopened after the Christmas holiday to deal with this allegation.

11. The claimant went to work as normal on 6 January 2020. He changed into his work clothes, shortly after which, he was called into the office where Mrs

Pritchard told him he was suspended, as it had been reported that he had made a spanner and a jig for a competitor company.

12. The letter of suspension dated 6 January 2020 and hnded to the claimant said that the reason for his suspension was " you have without permission removed equipment from the business and have made tools and have passed on to our direct competitor".

13. On the same day, two new members of staff joined the respondent. These were James Rice and Jordan Rumbelow. Both of them had previously worked for the same competitor business which the claimant was accused of having made the equipment for. James Rice had given a statement to Mrs Pritchard suggesting that the claimant had made the items. This statement was sent to the claimant along with a letter inviting him to a disciplinary hearing. The respondent had no disciplinary procedure and no staff handbook.

14. Mrs Pritchard also spoke to Jordan Rumblelow and Liam Gillespie, neither of whom gave any written evidence. Mrs Pritchard said they confirmed what James Rice had told her. Liam Gillespie was a former employee of the competitor who now worked as an independent consultant, using the respondent's offices. He had a dispute with the competitor company. He had not mentioned the jig or spanner to Mrs Pritchard before. But, when asked by her, he told Mrs Pritchard that he had seen the jig at the competitor's premises prior to his termination of employment in July 2019. Mrs Pritchard did not attempt to speak to Paul Brewin, although he was said to be the source of the information at the competitor and a former employee of the respondent. She spoke to the office manager of the competitor who also said that Paul Brewin had told her the same information.

15. A further letter was sent to the claimant on 8 January inviting him to a disciplinary hearing, The letter stated that " the allegation that you have without permission, have made equipment using Thorn Plant specific tools and designs, specifically these are; Titan Jig for Retaining Clamps and also Titan Spanners. It is further alleged that these products have been passed on to our competitor".

16. A disciplinary hearing was held on 13 January 2020 during which the claimant denied that he had made the items, nor been to the competitor's workplace and questioned the evidence which the respondent had to indicate that he had. The claimant also pointed out that a former employee Paul Brewin, was now running the competitor business and he would have been capable of making such items. Mrs Pritchard did not tell the claimant that the jig had been seen at the competitor's premises in July 2019.

17. The statement written by James Rice and dated 6 January 2020 indicates that he was recently shown some 'Titan spanners' and asked to spray paint them. It also says that he was told that the "Thorn welder would be coming into weld these".

18. The claimant indicated at the disciplinary hearing that he felt that he was being forced out because the respondent wanted to replace him with

someone who could work full time. At the time of the disciplinary, Mrs Pritchard did not know the dimensions of the spanner and jig. The patterns of them were drawn on paper by her for the purposes of the Tribunal hearing. She made her decision to dismiss the claimant for gross misconduct, based on the evidence from James Rice and her view that the claimant was the only person who had access to the tools to make the spanner and the jig.

19. The following day the claimant received a letter confirming his dismissal and offering the opportunity for appeal. The letter contained reference to the reasons relied upon by the respondent.

20. The claimant made a written appeal on 18 January 2020. It took some time to arrange a date on which the claimant could be accompanied to a hearing by his brother. The appeal took place on 12 February 2020. The claimant pointed out that the tools could not have been made at the respondent's premises as the claimant would have been seen on CCTV making them and removing them. He also pointed out that they were not unique and could be made by anyone and that the respondent had not lost a competitive edge as a result of the competitor having these tools. He also raised the issue of Mrs Pritchard wanting to dismiss him due to his flexible working agreement.

21. Miss Tracey dismissed his appeal, saying that she had undertaken further investigation, including speaking to the yard foreman and looking at the machinery which would have been involved in making the tools. The claimant had not been told of this evidence, or given the opportunity to challenge it. The claimant asserted that the machinery is within sight of the CCTV, but this was not investigated. The appeal outcome acknowledged that the items are not patented and that anyone with the right equipment could have made them.

22. The claimant was aware of other staff who were not treated in the same way as others had been accused of stealing from the claimant. He referred to a driver who was caught stealing diesel but was not dismissed and a foreman who assaulted another member of staff but was not dismissed.

The Law

7. The claimant asserts that he was unfairly dismissed by the respondent.

8. The Tribunal must consider whether the dismissal was unfair. In doing so they consider the following issues in accordance with s.98 Employment Rights Act 1996 ('ERA') and BHS v Burchell [1978] ICR 303;
    a. What was the principal reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant's conduct.
    b. Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?

c. Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?
d. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
e. Did the respondent carry out a reasonable investigation in all the circumstances?
f. It is also contended by the claimant that an unfair procedure was followed,

9. In accordance with Iceland Frozen Food v Jones [1982] IRLR 439 whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.

10. It is not necessary to consider whether the appeal was a review or a rehearing as Taylor v OCS Group Limited [2006] IRLR 613, CA indicated that what is important is that the procedure was fair overall. It also sets out that an appeal can correct any defect in the initial investigation or procedure.

11. If the dismissal was unfair, the Tribunal must consider whether the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

12. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? Polkey v AE Dayton Services [1987] UKHL 8.

13. A flexible working request is made under s.80F ERA
(1)A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
(a)the change relates to—
(i)the hours he is required to work,
(ii)the times when he is required to work,…....
(iv)such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,

(2) An application under this section must—
(a)state that it is such an application,
(b)specify the change applied for and the date on which it is proposed the change should become effective, and
(c)explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with,
….....
(4)If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

14. In relation to a claim for detriment as a result of a request for flexible working the law sets out in s. 47E ERA 1996 that

" (1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee—

(a)made (or proposed to make) an application under section 80F,
(c)brought proceedings against the employer under section 80H, or
(d)alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

2)This section does not apply where the detriment in question amounts to dismissal within the meaning of Part 10".

15. The burden is on the employer to show that the ground on which any act, or omission was done.

16. In relation to a dismissal as a result of a request for flexible working, s.104C ERA 1996 sets out that
" An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) made (or proposed to make) an application under section 80F,
(c) brought proceedings against the employer under section 80H, or
(d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings."

17. If the reason for the dismissal is related to the application for flexible working it will be 'automatically' unfair and no consideration of reasonableness is required.

The Decision

Flexible working

18. The respondent was very supportive and accommodating as an employer to the claimant when his son was born. After a conversation between the claimant and Mrs Pritchard, in April 2019 he was allowed paid time off, an altered working pattern/reduced hours and to carry a mobile phone. The alteration to his working pattern/reduced hours amounted to a flexible working pattern in accordance with s.80F ERA 1996.

19. Mrs Pritchard spoke to the claimant in July 2019 with regard to her decision to employ another welder to cover the two days that the claimant was not working. The respondent had no obligation to consult the claimant on this step. However, it caused friction between them, as the claimant felt that he could cover all the work in three days and that her proposed action made his position less secure. The claimant felt that he was being consulted for his view, which was then ignored. In fact, the respondent had no obligation to consult the claimant before they hired another welder. This action, although well intentioned, in fact soured the relationship between the claimant and respondent. This consultation did not amount to a request for flexible working (as this had been in place since April 2019) and was not the reason for dismissal.

20. Nor did the consultation by Mrs Pritchard amount to a detriment. The claimant had no right or expectation to be consulted about the respondent's intention to hire other staff. The claimant may not have agreed with Mrs Pritchard's view, but he did not suffer any detriment as a result of the conversation. His job was not any less secure as a result of their discussion.

21. The removal of the permission to carry a mobile phone and Mrs Pritchard's request to other staff not to speak to the claimant during working hours would amount to detriments, as they are actions which removed a permission which the claimant had and this upset him. However, neither of these actions could be said to be done because of a request for flexible working. The claimant had made his request in April 2019, which had been granted. The detriments suffered by the claimant did not occur until July 2019. The claimant's own evidence supported the fact that Mrs Pritchard's attitude towards him changed after a director of the respondent retired. The lack of oversight by the previous director meant that Mrs Pritchard was free to treat the claimant differently at this time. It was not related to his request for flexible working.

Disciplinary and Dismissal

22. The Tribunal must consider whether Mrs Pritchard had a genuine belief that the claimant had made and supplied a spanner and jig to a competitor. In considering whether she had a genuine belief the Tribunal has considered the evidence she relied upon to reach her conclusions:-

23. Mrs Pritchard had the evidence of one, new employee, James Rice to suggest that the spanner and jig were made by the respondent's welder for a competitor. She accepted this to mean the claimant, as he was the only welder at that time. She took no steps to confirm that it was the claimant who was referred to. Her investigation did not include speaking to Paul Brewin, the source of the information and an ex-employee of the respondent. Nor did she investigate when or where the spanner and jig were made. She assumed that they had been made at the respondent's premises, but did not carry out any examination of the CCTV (or otherwise) to see if the claimant could be seen making these items.

24. The written evidence provided by James Rice on 6 January 2020 indicated that the spanner and jig were new as he said he had not seen the jig before and he was asked to spray paint the spanner. This does not accord with the evidence that the items were there in July 2019, when Liam Gillespie left the competitor. James Rice's evidence that the "Thorn welder was coming to weld these" also does not accord with the respondent's accusation that items had been made and removed at the respondent's premises.

25. Mrs Pritchard also relied upon the evidence of Liam Gillespie, a former employee of the competitor who was in dispute with them, but whom had never mentioned this information before, despite his suggestion that he had been aware of it since before July 2019. The Tribunal did not consider that Mr Gillespie was a reliable witness. Had Mr Gillespie known this information, it is likely that he would have told Mrs Pritchard of it at an earlier date. There is no plausible explanation as to why Mr Gillespie did not do so. Nor did Mrs Pritchard enquire or question why Mr Gillespie had not mentioned this earlier.

26. Mrs Pritchard did not take into account the inconsistencies in the evidence before her. Nor did she investigate whether Mr Brewin or others at the competitor were able to manufacture these items.

27. Mrs Pritchard did not investigate when these items were said to have been produced and whether it was feasible for the claimant to have made them at that time. Mrs Pritchard's investigation was insufficient in that she failed to identify evidence which corroborated the statement of James Rice. She had no evidence that the items had in fact been made by the claimant, nor that they had been made on the respondent's premises, using their tools or materials. No CCTV was considered or shown to the claimant, although it was not clear that this would have helped to resolve the issue in any event.

28. Furthermore, the letter of suspension did not specify what the items were that the claimant was accused of making and handing to a competitor. The letter of suspension also accused the claimant of theft, whilst the letter of invite to the disciplinary hearing did not mention this. It was not until 8 January 2020 that the claimant was told of the allegation against him. He therefore had five days to prepare to defend himself

29. Mrs Pritchard failed to ensure that the evidence she had was reliable, to the extent that she did not carry out a reasonable investigation. The fact that she carried out the investigation, the decision to go to a disciplinary hearing and the decision to dismiss is not ideal, but it is acknowledged that the respondent is a small employer with limited resources readily available. It is clear that once Mrs Pritchard had the evidence of James Rice indicating that it was the claimant who had done this; she was content to accept that and act on it.

30. The evidence obtained by Mrs Pritchard was not sufficient to amount to a reasonable investigation, giving her reasonable grounds to believe that the claimant was guilty of misconduct.

31. The claimant's appeal was heard by Ms Gemma Tracey. He was given an opportunity to raise the issues of his appeal at a meeting. Ms Tracey said that she would investigate the points, but did so only by speaking to James Rice once again and the yard foreman. This did not address the issue of whether James Rice's word alone was sufficiently reliable. Ms Tracey's outcome also failed to identify whether anyone else could have made the tools at the respondent premises. She relied on evidence from the end customer which was not shown to the claimant.

32. Ms Tracey referred in her outcome letter both to the fact that the items were made separately and welded together later and also to the fact that it was alleged that they were made on the respondent's premises. She did not resolve this inconsistency. Thus, the appeal did not resolve the problems with the investigation carried out by Mrs Pritchard, as to identifying when and where the tools were made and by whom. By the end of the appeal the dismissal was and remained unfair despite the appeal hearing.

Polkey and Contribution

33. As the finding of the Tribunal is that the investigation was insufficient to allow Mrs Pritchard to have reasonable grounds to belief that the claimant made the tools, there can be no contributory fault by the claimant.

34. The respondent failed to carry out a reasonable investigation, had they done so, they would have spoken to Mr Brewin, whose un-sworn evidence I have seen in the form of a witness statement. That would have indicated that James Rice was mistaken and would have confirmed that Mr Brewin himself had instructed the claimant how to make these tools. It is therefore more likely than not, that the claimant would not have been dismissed, as there would have been doubt as to whether the claimant did in fact make the tools. On balance there is no appropriate reduction under the principles in Polkey.

Compensation

35. The claimant's basic award is **£2,632**, representing 7 complete years of service below the age of 41 years. His gross weekly pay was £376.

36. The claimant provided evidence to the Tribunal from his GP, by way of a letter dated 17 September 2020, which indicated that the claimant had been suffering from anxiety/depression and had been issued with a sick certificate continuously since 17 January 2020 to the date of the letter.

37. The claimant's evidence was that he commenced working as self employed in October 2020. His weekly net income from the respondent was £305. Having considered the claimant's schedule of loss in the bundle, I make the following
awards;

Loss of Earnings 14/1/20 to 11/10/20 (38 weeks) @ £305 =	£11,590
Loss of Pension 38 weeks x £18 =	£684
Loss of Statutory Rights	£300
Less income received	£3,460
Total compensatory award is	**£9,114**

38. For the purposes of the recoupment of benefits, the prescribed period is from **14 January 2020 to 23 April 2021** when compensation evidence was heard by the Tribunal. The prescribed element of compensation is **£11,590** and the balance of **£1,140** should be paid to the claimant immediately.

Contract of Employment

39. In relation to the issue of the contract of employment. Prior to the second day of the hearing, the respondent produced a document said to have been found on an old hard drive which they asserted was a contract of employment twice signed by the claimant. The claimant provided evidence from a handwriting expert which indicated that the two signatures were so similar as to be a copies of each other, which it was submitted was so unlikely as to be unreliable. The Tribunal accepts that this document was not available at the first hearing and has been produced without evidence of where or how it was found. The independent handwriting expert has no part in the outcome of this case and is therefore truly independent. Equally, they were not available for cross- examination by the respondent. On balance, I accept the claimant's assertion that the veracity of this document cannot be relied upon and find therefore that a contract of employment did not exist at

the time of the claimant's employment and compensation of two weeks of gross earnings should be awarded amounting to **£752.**

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Employment Judge Cowen

Date: 30th September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7th October 2021

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FOR EMPLOYMENT TRIBUNALS