EMPLOYMENT TRIBUNALS

Claimant: Mr C Peterson

Respondent: Lindsey Clerk Brothers Limited

Heard at: Watford ET by CVP **On:** 6 January 2021
Before: EJ Cowen

Representation:
Claimant: Mr Carl Peterson, In person
Respondent: Mr Andrew Keen, Director

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

"**This has been a remote hearing. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to were provided by the parties and I have recorded the contents which I have referred to.**

RESERVED JUDGMENT

1 The Claimant's claim for Unfair Dismissal succeeds.

2 The Claimant's claim for Wrongful Dismissal succeeds.

3. A remedy hearing will be listed on 30 March 2021 to decide the amount of compensation payable to the Claimant.

REASONS

Introduction

1. By way of a claim issued on 3 September 2019, the Claimant claimed unfair dismissal and wrongful dismissal from his employment as a delivery driver for the Respondent. The case was due to be heard in Spring 2020, but was postponed due to the Covid-19 pandemic and was relisted and heard by CVP online hearing on 6 January 2021.

2. The Tribunal was provided with the pleadings from both parties, a bundle of

correspondence provided by the Claimant and witness statements from the Claimant, Ian Taylor and Shane Taylor on behalf of the Claimant and witness statements from Andrew Keen, Graham Keen and David Hounsome on behalf of the Respondent. Neither Ian Taylor, nor David Hounsome attended the Tribunal and were not subject to cross examination. The Tribunal amended the weight to be attached to their evidence in light of the lack of oral evidence.

3. The Claimant represented himself at the hearing and the Respondent was represented by Andrew Keen, one of the two brothers who are joint Directors of the Respondent company. Both sides made closing submissions, which the Tribunal took into account.

The Facts

4. The Claimant was employed as a delivery driver by the Respondent firm who deal in landscape materials. He commenced work on 17 June 2015 and his employment terminated on 10 April 2019.

5. The Claimant worked well for the Respondent and had no previous disciplinary record, although there had been previous incidents where the Claimant and the Director of the business, Graham Keen had heated exchanges, Graham Keen had chosen not to follow these up with any type of warning for fear of provoking further anger on the part of the Claimant. He therefore had a clean disciplinary record.

6. On 10 April 2019 the staff were handed their payslips. Upon opening his, the Claimant discovered that a greater amount had been deducted for pension payments than he considered appropriate. He made comment about this to his colleague Shane Taylor who said that his payment was more. This led the Claimant to consider that Mr Taylor was being paid more than him, which upset the Claimant as he was the longer serving employee of the two. The Claimant showed Mr Taylor his payslip. In response Mr Taylor suggested that the Claimant should speak to their manager Mr Dave Hounsome about it.

7. The Claimant felt upset and undervalued and wanted to show this to his manager, so he walked across the yard and spoke to Mr Hounsome about the issue. The Claimant indicated that he felt Mr Hounsome was “taking the piss”, and said that he thought Mr Hounsome must think him an idiot. He ended the conversation by saying “see how you get on today without me. Tell Andrew to call me”. The Claimant then returned to his van and drove home. The Claimant believed he was making a stand and protesting and that he would then negotiate to try to achieve a higher level of pay.

8. The following day,11 April 2019 the Claimant contacted Mr Hounsome, but he told him the Claimant couldn’t speak to him and the Claimant should speak to Andrew Keen. The Claimant phoned Andrew Keen in the expectation that they would discuss the issue and come to some compromise. Instead Andrew Keen said that he accepted the Claimant’s resignation. The Claimant insisted he had not resigned. At that point the Claimant had not seen a letter dated 11 April sent by Andrew Keen. That letter did not arrive with the Claimant until 22 April.

9. The Claimant wrote to Andrew Keen on 12 April outlining what had happened in their phone call and requesting reasons for his dismissal.

10. On 18 April, Andrew Keen wrote to the Claimant setting out that he believed that on 10 April the Claimant had said to Mr Hounsome "you can stick your fucking job up your arse and see how you get on without a driver". Andrew Keen took this to be a resignation on the part of the Claimant.

11. The Claimant raised a formal grievance which in fact amounted to an appeal against his dismissal by a letter dated 24 April. He indicated that he did not resign and denied being abusive. He also pointed out that Andrew Keen's decision to dismiss was based only on Mr Hounsome's version of events.

12. No formal meeting was called in response to this letter and no grievance or disciplinary appeal process was followed. The Claimant received a reply from Andrew Keen dated 30 April which asserted that the Claimant had been aggressive on more than one occasion to Graham Keen and Mr Hounsome. Andrew Keen also said that he had no reason to doubt Mr Hounsome's relay of the words used. The letter did not offer to discuss the matter at a meeting, but asserted that the Claimant has caused damage to the Respondent's business. Andrew Keen also made reference to bouts of aggression over a period of years. He concluded by saying " I will not re-consider your actions further".

Law

13. The Claimant claims Unfair Dismissal under s. 95 and 98 Employment Rights Act 1996 ('ERA'). The Respondent asserts that the Claimant resigned or alternatively, that a potentially fair reason under s.98 was conduct.

14. In deciding whether there was a resignation the Tribunal must consider where words are said in the heat of the moment or under pressure by the employee, whether the individual might not mean what is actually said; Sovereign House Security Services Ltd v Savage [1989] IRLR 115, CA. If the words used in the heat of moment are words of resignation by the employee, an employer that fails to allow a reasonable period of time to elapse before accepting the resignation runs the risk of being found to have dismissed the claimant: Kwik-Fit (GB) Ltd v Lineham [1982] ICR 183, EAT.

15. If there is a dismissal s.98(4) ERA the Tribunal must consider the fairness of the dismissal

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case."

16. The leading case of British Home Stores v Burchell [1980] ICR 303 indicates that the Tribunal must consider the following factors in a matter of Unfair

Dismissal for reasons of conduct-

16.1 Did the Respondent have a genuine belief that the Claimant had committed misconduct.
16.2 Was that belief based upon reasonable grounds.
16.3 Were those grounds the result of a reasonable investigation.
16.4 Did the Respondent follow a fair procedure.

17. Furthermore, the Tribunal must consider-

17.1 Was the decision to dismiss within a band of reasonable responses.
17.2 Whether the equity and the substantial merits of the case point to an unfair dismissal.

18. If the Tribunal consider the dismissal was unfair, it must consider what the outcome of a fair procedure would have been; King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House),

19. The Tribunal must also consider under s.123(6) ERA 1996 whether deduction should be made from the compensatory award for any contributory actions by the employee which could be said to be blameworthy and have led to the dismissal.

20. The claim of wrongful dismissal requires a different test by the Tribunal to that of unfair dismissal. Wrongful dismissal is a common law claim of breach of contract. Hence the Tribunal must consider the terms of the contract and whether the actions of the employer have been in line with the contract. Where a dismissal has occurred without payment of contractual notice ('summary dismissal'), the Tribunal must consider whether the Claimant's actions were sufficient to warrant a breach of contract to allow the employer to end the contract summarily.

Decision

21. The Respondent asserts that the Claimant resigned, or alternatively that his actions amounted to gross misconduct in the way in which the Claimant spoke and acted towards Mr Hounsome on 10 April 2019.

22. The Claimant's evidence that he said to Mr Hounsome on 10 April "see how you get on today without me. Tell Andrew to call me", was corroborated by Mr Taylor to some extent and also by the witness statement of Mr Hounsome which set out the words as "I'm off, now let's see how you cope without me". I am satisfied that the content of Andrew Keen's letter on 18 April in which he asserted that the Claimant had told Mr Hounsome to "stick your fucking job up your arse and see how you get on without a driver" is not in accordance with the witness statement of Mr Hounsome which was produced, although Mr Hounsome was not present to give evidence in support of it. I noted that the Respondent did not rely on these words in their Grounds of Response to the claim, but relied on the words set out in Mr Hounsome's witness statement. As Andrew Keen was not present at the time of the conversation, he must have been relying on what he was told. The letter does not reflect what the witness says occurred and therefore the letter was not based on the

evidence.

23. I also took into account the evidence of Mr Taylor, who denied that he heard the Claimant say the words which are set out in Andrew Keen's letter. He did corroborate that the last words said by the Claimant were to ask Andrew Keen to call him. I therefore accept the Claimant's version of what was said on 10 April.

24. In considering whether the words spoken by the Claimant amount to a resignation, I took into account the fact that the Claimant spoke them at a time when he had discovered that a colleague with less service for the company was earning more than him and that a contractual review of his salary had not taken place. I also took into account the expectation of the Claimant that this incident would lead to an opportunity to speak to Andrew Keen to resolve the issue of his pay. His final words to Mr Hounsome were to prompt a further discussion with Andrew Keen and thus show that he did not feel this was the end of the matter.

25. The Claimant's actions of contacting Mr Hounsome the following day and calling Andrew Keen are also both indicative of the fact that he did not consider that his relationship with the Respondent had ended. He took clear steps to return to work and to clear the air. I therefore accept that the Claimant did not intend to resign on 10 April, but left after he lost his temper and spoke the words in the heat of the moment.

26. Furthermore, I find that a heated exchange between an employee and their manager may amount to misconduct and therefore a dismissal for this reason is a potentially fair reason under s.95 ERA 1996. Equally, where the employer considers that the words may amount to resignation they should ensure that they allow a sufficient cooling off period to occur and a failure to allow such a time may amount to an unfair dismissal.

27. I considered whether the Claimant's conversation with Andrew Keen on 11 April occurred after such a sufficient time. The Claimant had already decided by the time he spoke to Andrew Keen that he did not wish to make his exit from the Respondent a permanent one. Andrew Keen was not prepared to consider that possibility by 11 April. Andrew Keen's evidence was that he did not want a confrontation with the Claimant and so decided not to engage in any further discussion about the position.

28. I find that Andrew Keen, when told by Mr Hounsome of a confrontational and heated exchange resulting in the Claimant failing to finish his day's work, believed that the Claimant had behaved inappropriately. He therefore had a genuine belief in the Claimant's misconduct. In his evidence to me, Andrew Keen said that he didn't feel he needed to speak to the Claimant about the incident, which I took to be an admission that no investigation was carried out.

29. However, he took this as an opportunity to end the relationship whether the Claimant wished to do so or not. He did so without any discussion with the Claimant, nor by following any company procedure or any process in

compliance with the ACAS Code of Practice for Disciplinary hearings. There is no evidence that an investigation was carried out. No record of interview of Mr Hounsome, the Claimant, nor Mr Taylor was provided to the Tribunal. There was no suggestion that Andrew Keen had attempted to meet with the Claimant and to hear his side of the incident. Nor did Andrew Keen take into account any of the surrounding circumstances with regard to the Claimant's pay, length of service or record.

30. I conclude that Andrew Keen therefore did not have reasonable grounds on which to base his belief and had not undertaken a reasonable investigation of the circumstances.

31. I note that paragraph 9c of the Claimant's contract refers to the employer being entitled to terminate the employment without notice or compensation for such termination if "you are found guilty of any gross misconduct offence". Gross misconduct is not defined in the contract. However, 'found guilty' clearly implies a process and therefore the Respondent was in breach of their own procedure as well as failing to follow a reasonable process prior to dismissing the Claimant.

32. I conclude that the Claimant was unfairly dismissed by the Respondent. An uplift of 25% will be applied to compensation for a failure to follow the ACAS Code of Practice at all. As outlined above, no opportunity to answer the allegation was given to the Claimant and no reasonable investigation was carried out prior to the decision to dismiss.

33. I also considered whether, if a fair process had been carried out by the Respondent, the Claimant would have been dismissed. I find that the evidence shows that the Claimant would have indicated his desire to continue to work during an interview with Andrew Keen. The Respondent also indicated in its evidence that there had been a number of previous occasions where the Claimant had behaved aggressively towards a manager, but no disciplinary action had been taken. The letter of 11 April referred only to the Claimant leaving his workplace and not to any aggressive behaviour. I took into account the letter of Andrew Keen on 30 April where he indicated that the Respondent had lost business as a result of the departure of the Claimant. I concluded that if a fair procedure had been carried out the Respondent would not have dismissed the Claimant on this occasion.

34. Finally, I considered whether the actions of the Claimant contributed towards his dismissal. The incident occurred due to the Claimant's upset at discovering that his colleague was being paid more and his feelings of inequity. The Claimant spoke to his manager with profanity and with assertive language. He then left his workplace before his contractual hours were complete and without permission. The Respondent described the Claimant as passionate and that this can come across as aggressive to others. He must therefore be considered to have acted in a way which was sufficiently blameworthy to have attracted at least some disciplinary investigation. I consider that the Claimant's actions were 30% the source of the dismissal and compensation will be adjusted accordingly.

35. The Claimant also brought a claim of wrongful dismissal, claiming that the

Respondent breached his contract by failing to pay any notice period. The test associated with such a claim is separate to that of unfair dismissal and requires consideration of whether the actions of the Claimant were in fact a breach of his contract sufficient to warrant summary dismissal. The Claimant's contract outlined at paragraph 8.1 that he will be provided with a notice period of one week for each continuous year of employment up to a maximum of 12 weeks. Further, at paragraph 9c), the contract indicated that the Claimant may be dismissed for gross misconduct under the employer's disciplinary rules. Those rules at paragraph 15.2 refer to 'serious misconduct' which may cause dismissal without any period of warning or notice. However, there is no definition of 'serious misconduct' and no examples are provided.

36. The insubordination of the Claimant included profanity and he left the workplace without permission. However, as there is no indication of the distinction between misconduct and serious misconduct in the contract, I do not find that the Claimant's actions fell towards the highest end of misconduct in the workplace. I conclude that the Respondent was in breach of contract by dismissing without payment of a notice period.

37. The Claimant has failed to provide details of his pay or a schedule of his losses. The matter will have to be listed for a remedy hearing. A separate order providing directions for both parties to prepare for such a hearing, will be provided.

_____

Employment Judge Cowen

Date____22/02/2021_____

JUDGMENT SENT TO THE PARTIES ON

.....11/03/2021.....
T Henry-Yeo
.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.