



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G S Heire

**Respondent:** European Toughened Glass (Manchester) Ltd

**Heard at:** Manchester

**On:** 3-5 October 2018

**Before:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** Ms A Isherwood, Solicitor

**Respondent:** Ms L Halsall, Solicitor

**JUDGMENT** having been sent to the parties on 21 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant, by a claim form dated 23 November 2017, brought a claim of unfair dismissal, in the alternative unfair constructive dismissal, wrongful dismissal and failure to provide written particulars. He had also brought a holiday pay claim and a breach of contract in respect of an expenses claim but he did not pursue these at Tribunal.

### The Issues

2. The issues in this case are:

Unfair Dismissal

- (1) Whether the claimant was dismissed under section 95(1)(a) of the Employment Rights Act 1996 by the words and/or actions of the respondent on 3 July 2017, or some other date; and if so
- (2) Whether the dismissal was for a potentially fair reason under section 98(1) and (2), in this case SOSR; and if so
- (3) Whether the respondent acted reasonably under section 98(4).
- (4) If the claimant was not dismissed under section 95(1)(a) then the Tribunal will determine whether the claimant resigned because of a fundamental breach of contract on the part of the respondent and was therefore dismissed under section 95(1)(c).
- (5) In this case, the claimant relies upon a breach of the implied term of mutual trust and confidence which can be summarised as working excessive hours, a lack of support, aggressive and abusive behaviour of Mr Johal, being replaced by other employees.
- (6) If there was a dismissal under section 95(1)(c), whether there was a potentially fair reason under section 98(1) and (2).
- (7) Whether the respondent acted reasonably under section 98(4).

Breach of Contract

- (8) Whether the respondent was in breach of the claimant's contract of employment by failing to pay him his notice pay.

Failure to issue a statement of particulars

- (9) Whether the respondent failed to issue a statement of employment particulars under section 1 of the Employment Rights Act 1996 and whether the claimant is therefore entitled to a remedy under section 98 of the Employment Act 2002.

**Witnesses**

3. The Tribunal heard from, for the claimant, the claimant himself and Mr J S Birdi, engineer. For the respondent the Tribunal heard from Mr M Johal, Director; Mrs F Johal, Secretary; Mr A Chinthala, Factory Manager. A witness statement was submitted for Mr John Coomber but he did not attend the hearing and no weight was attached to that witness statement. There was an agreed bundle of documents.

Credibility

4. The issue in this case was whether the claimant had resigned with three days' notice or whether he had been dismissed by the respondent, either in a telephone

call on 29 June or on 3 July. I have preferred the claimant's version of events for the following reasons, which will be clearer once the facts as found are recited:

- (1) The claimant's witness statement was consistent with his grievance and claim form, and with the evidence he gave at the grievance hearing.
- (2) Mr Birdi's evidence corroborated and was consistent with the claimant's evidence in specific and generalised matters, for example –
  - (i) That Mr Johal swore at Mr Birdi also;
  - (ii) That Mr Johal on one occasion had also sacked Mr Birdi;
  - (iii) That Mr Johal told Mr Birdi he had suspicions about the claimant trying to ruin his business;
  - (iv) That Mr Johal had dismissed the claimant because he did not trust him.
- (3) Mr Johal's evidence was unreliable in some parts as follows:
  - (a) Re the issue of contracts of employment, he said one had been sent out and yet in cross examination it was entirely clear he did not actually know this;
  - (b) That he had said in his witness statement problems began in June but his oral evidence was that there had been problems throughout the claimant's employment;
  - (c) He agreed that the claimant rang John Coomber on 28 June and therefore corroborated to some extent the claimant's evidence;
  - (d) He also corroborated Mr Birdi's evidence regarding various telephone calls, although not necessary the full extent of what Mr Birdi said was said.
- (4) Mrs Johal's evidence was unsatisfactory also, for example:
  - (a) She was completely confused as to when she was told that the claimant had resigned and that Mr Chinthala was helping out. She said at one point it was one week and then at another point two weeks, then she found out both at the same time. In any event, her and Mr Johal's evidence that he did not tell her for two weeks was wholly unsatisfactory as it was totally unrealistic.
  - (b) In addition, she was unconvincing regarding when and how she advised the accountant to issue the P45, in particular not producing any documentary evidence which would have supported this and maybe would have shed light on what she understood at the time was the reason for issuing the P45.

- (5) As for Mr Chinthala's evidence, he only knew a small proportion of what had happened in any event. He only knew what he was told. Where he was giving direct evidence, I bore in mind that he was unhappy with the claimant and had left because of the claimant, and his evidence was rather repetitive: it was as if he had learned a couple of phrases like he was "there to help" and under no circumstances must say he was there to take over. On balance I felt the claimant's evidence regarding his dealings with Mr Chinthala on 3 July were more convincing.
- (6) Failure to call Mr Coomber or address the issues in his witness statement – whilst Mr Coomber was said to be ill no medical evidence was submitted.

5. In respect of the claimant's credibility I did also consider potential inconsistencies in the claimant attending work on Friday, Saturday and Monday when he was already dismissed. However, given the evidence I heard from both of them about Mr Johal and that he had changed his mind about dismissals in the past, this made more sense. I also accept the claimant was hoping that he would change his mind but this was dispelled when Mr Chinthala turned up, and he did immediately leave the premises. In relation to the fact he did not bring a grievance for three weeks after his alleged dismissal, this again was explained by the claimant waiting to see what the respondent would do. Finally, in the absence of any communication, and in the absence of a P45, he put in his grievance. All of these issues are dealt with in the written reasons below.

### **Findings of Fact**

The Tribunal's findings of fact are as follows:

6. The claimant began working for the respondent in September 1999 as General Manager of the respondent's business in Manchester. Mr Johal, who is a 40% shareholder and director of the company, is the claimant's first cousin and asked him to manage the business. The business manufactures large architectural glass for residential and commercial premises. Mr Johal invested £50million in setting up the Manchester business. He has other companies in his group producing glass, some laminated, some toughened, in London and Swindon at least.

7. The claimant alleged he did not get paid for the first 18 months of his employment. However, this was not a matter on which he relied for a claim nor was it truly germane to deciding credibility and therefore I have made no finding in respect of this.

8. The respondent gave contradictory evidence regarding the claimant's performance. Mr Johal said that the claimant was always to some extent a problematic employee and that the number of customers had reduced from 100 at the beginning of the business to 12 at the end. However, in his witness statement he said problems only began in June 2017.

9. I find that there were likely to be problems from time over a 19 year period. The situation was that the claimant had considerable autonomy at the factory but Mr

Johal was very much “hands on”, by the telephone, he rarely actually visited Manchester. The evidence was he would be quite abusive on the telephone and would not listen to what people had to say. I accept that he was like this to some extent from the evidence given by the claimant and Mr Birdi. The claimant recruited Mr Birdi towards the beginning of his time at the factory. He was an engineer and he worked as an engineer until some time after the claimant left. Mr Chinthala was recruited later on, and became more or less the claimant’s deputy.

10. For completeness sake I should say Mr Johal operated as overall Operations Manager and Managing Director. Mrs Johal was initially in charge of payroll and latterly HR.

11. Mr Chinthala left in 2015 and went to work at the respondent’s Swindon factory before leaving again to work in his wife’s travel agent business. He said in re-examination that the event which led him to issue a grievance against the claimant was that he had been off sick and when he returned the claimant had appointed his own son (Mr Heire’s) in his place and would not give him back his previous role. However, this grievance was not in the bundle and therefore it was not supported by any documentary evidence.

12. The claimant said after Mr Chinthala was appointed by himself in 2002 and was trained up Mr Johal was more confident that he could manage without the claimant and became more abusive and critical towards the claimant. In one incident in 2004-2005 Mr Johal told the claimant to “f... off and get out of the factory”. Mr Chinthala was sent to collect the company car keys from the claimant's home, but after intervention from Mr Birdi the message came back to the claimant through Mr Birdi that he could return to work.

13. During the hearing the respondent alleged that the claimant would often resign and disappear for a few days and then turn up, and that this was his normal behaviour. There was one example in the bundle from 2006 of a letter from Mr Johal stating that by mutual agreement the claimant was leaving. However, the claimant stated that he had never resigned and that this was all Mr Johal’s doing. Indeed, the letter was signed only by Mr Johal and there was no corroboration at all regarding this incident.

14. In 2016/2017 the claimant had difficulty retaining staff. He said he asked the respondent several times to give employees pay rises but they were always refused. The respondent denied this and said the claimant could have given staff pay rises at any time. I accept the claimant's evidence in this regard because it is inherently improbable that a General Manager with no shares in the business and not a Director would be able to this, particularly in a business with an operationally hands on manager such as Mr Johal.

15. The event which led to this claim being brought began on 19 June. The business was providing glass to a sister company and their manager, TP, called the claimant on 19 June to complain about some marks on the glass. The claimant said he would check the other panes of glass to see if it was an ongoing fault but could find nothing wrong with any of the glass, but just be sure he decided he would close the furnace over the weekend and thoroughly clean the ceramic rollers. Usually this

takes 36 hours so he expected to be up and running by Tuesday evening. However, on this occasion it proved to take longer.

16. TP reported the marks to the Johals and as a result Mr Johal rang the claimant about it. The claimant explained about closing the furnace down and stated that some of the problems regarding laminate glass were nothing to do with him as this glass had been provided from elsewhere within the business.

17. On 20 June the claimant advised TP of the plan to close the furnace. The next day, unbeknown to the claimant, Mr Birdi was asked by Mr Johal to check the glass but not to tell the claimant. He did so and found there were no marks. He also decided to contact JW, a surveyor and senior employee, also working for the sister company TP worked for to ask about the marks. JW said that they had cleaned the marks and they had come off quite easily.

18. Mr Johal rang Mr Birdi again before Mr Birdi had been able to report back and in any event at this juncture Mr Birdi explained what he had found out. He then said that Mr Johal embarked on a "rant" about the claimant, saying he had hidden agenda and was trying to destroy him. Mr Johal said he had to get rid of him before he destroyed the company, and he would send someone from London to take over.

19. Mr Birdi heard nothing more and presumed Mr Johal had calmed down as before. The respondent opined that Mr Birdi's evidence was biased as he owed the claimant a favour as the claimant had got him the job at the respondent, however I found Mr Birdi a convincing and candid witness, for example he admitted he was there to support the claimant and he admitted they were close friends. However, I found his evidence convincing as it was also corroborated by Mr Johal on occasions, agreeing that he had had the conversation with Mr Birdi about the glass and that at the same time he had expressed concerns about the claimant.

20. Unfortunately, after closing down the furnace it could not be restarted properly on the Tuesday and it was producing a defect in the glass so trial runs had to be undertaken on the Tuesday. The claimant was very busy and stressed dealing with this. As a result the claimant candidly agreed that he had failed to either directly inform the client due for a delivery the next day, or ensure that somebody ensured the client that the delivery would not take place. The glass was being delivered to the Group's biggest client but it was not a large amount of glass.

21. On 28 June the client emailed the claimant to ask where the glass was. It was not an aggressive email and the claimant replied almost immediately, explaining the delay and assuring them they would have their glass by Friday. The same day the client's Head of Sales also emailed Mr Johal to complain about the delay and failure to warn them, and also about the claimant's attitude. It is not clear what this attitude, possibly the claimant's reply email was insufficiently apologetic. However, the Head of Sales was not overly concerned as he said he would visit Manchester and try and sort out the issues and simply wanted a steer from Mr Johal about preventing this happening in future.

22. The claimant said he was just so busy that day that warning the client went out of his mind, that he was even busier than usual because he had problems with

his Office Manager who had an injury that was causing him some pain, but he held his hands up and said it was not what usually happened.

23. Mr Johal rang the claimant several times that day, 28 June, before he managed to get hold of the claimant. He forwarded the Head of Sales' email to the claimant and asked him if he had seen it. He said he had not, but opened it while he was on the phone. I find that Mr Johal was angry at this point. It was clear in the Tribunal that he was extremely frustrated at having been unable to get hold of the claimant and needing to ring so many times, as well as being annoyed about the incident itself given the size of the client. I accept the claimant's evidence Mr Johal would not accept his explanation and that he eventually said to him, "You are trying to get rid of my customers, I am not having it". I accept this, as amongst other things it was consistent with what he had said to Mr Birdi. I also accept that Mr Johal said he was going to get rid of the claimant and would be sending someone else to replace him. Again, this was consistent with Mr Birdi's evidence.

24. The claimant subsequently rang Mr John Coomber, the Commercial Manager, to discuss what had happened up until then. He was hoping Mr Coomber would intercede with Mr Johal and put forward the claimant's explanation for what had happened in order to placate him.

25. Mr Johal agreed that he knew the claimant did ring Mr Coomber and suggested he rang him to confirm his resignation, not to relate what had happened with Mr Johal. However, it is inherently unlikely that he would have rung him simply to say he had resigned. Also I do not accept this because if he had told Mr Coomber he had resigned, Mr Coomber would not have been able to hold the grievance that the claimant brought later (being conflicted) and would have referred to this in the minutes of the grievance, whereas he tells the claimant in the grievance he understands he has been dismissed for incompetence.

26. Mr Johal then rang the claimant again on 29 June and asked for the telephone number of Mr Andrews. He told the claimant to give Mr Andrews the keys to the factory, obviously in order that somebody else could take over. The claimant agreed, but Mr Andrews when he came on the nightshift confirmed he had not been asked to take the keys off the claimant.

27. The claimant said that in the same conversation Mr Johal then told him to "fuck off" and "go and live on your pension". Mr Johal in cross examination said he would not have said this as he did not know whether the claimant had a pension, as he certainly did not have a company one. However, on the probabilities I find he could have said this as the claimant was old enough to claim a state pension by this stage as he was over 65, and I find in favour of the claimant's version of events for reasons of credibility I have set out at the beginning of this document.

28. The claimant then carried on working, although he believed he had been dismissed. He worked on Friday and on Saturday until lunchtime. He heard nothing more and so thought that Mr Johal may contact him and reinstate him. He attended work on Monday and found Mr Chinthala already there with two additional people looking round the factory. Mr Chinthala in evidence agreed he had been asked on the Wednesday to go to Manchester and help out. He was adamant in his evidence

he was not taking over. I found his evidence too adamant, and in particular there was an issue that Mr Chinthala said he was just going to work for a few hours in Manchester, but then he said 20-25 hours. Clearly that is not a “few” hours and the only reason for working 20-25 hours would be if he was going to run the factory.

29. The claimant said he asked Mr Chinthala what he was doing there, and Mr Chinthala said that Mr Johal had rung him on the Wednesday and asked him to find some people and go and take over the business, and that the claimant should go home and rest for 5-6 months. Mr Chinthala says this was not correct, and that he said to the claimant that if he wanted to stay and was not resigning he could do so and Mr Chinthala would go away and only come back when the claimant retired. However, I do not accept Mr Chinthala’s evidence. His witness statement was strangely worded, referring to the claimant in recounting dialogue with the claimant as “the previously factory manager” rather Mr Heire or the claimant; there was inconsistency in his evidence regarding the hours, and it was inherently improbable he would have given up a job working virtually full-time for his wife for a few hours at the factory.

30. The claimant then left on 3 July. Mr Birdi subsequently rang Mr Johal to ask if he had asked the claimant, and Mr Johal said “yes”, because he could not trust him.

31. The claimant expected some sort of communication from the respondent, as would have the Tribunal. Even on the basis of the respondent’s case that the claimant had resigned with three days’ notice one would have expected in a period following 7 July that a letter would have gone to the claimant stating that his resignation was accepted (although not strictly required in law, it is good practice), or to give him details of any pay owed, or simply to record that he resigned with effect from 30 June. Mrs Johal said that it was an oversight that no such letter had been sent. She agreed that normally this should have been done, however I cannot accept that as up until the time when the claimant put in his grievance on 31 July there was no correspondence at all.

32. The respondent suggested the claimant's failure to bring a grievance before 31 July suggested the claimant was lying and that he only brought a grievance when he had received his P45. I do not accept that for the following reasons:

- (1) There was no real advantage to the claimant in contending for an express dismissal as he had grounds for constructive dismissal claim, as he eventually argued in the alternative;
- (2) He was very upset after 19 years of working and it took some time for him to gather his thoughts together;
- (3) This was not put to him in cross examination, that he only put his grievance in after the situation crystallised on the receipt of his P45;
- (4) That it can be seen from his email raising his grievance, which he sent on 31 July, that he had not received his P45.



33. The claimant, as referred to above, sent a grievance in on 31 July setting out the circumstances he was aggrieved about, including that he had been expressly dismissed. The main relevance of that grievance is as follows:

- (1) Mrs Johal did not immediately respond to the claimant's grievance saying, "what was he saying, he had resigned" as the respondent now contends;
- (2) That the grievance was not immediately dealt with, which one would expect where there was such a glaring disagreement;
- (3) That John Coomber's, who conducted the grievance, minute suggested that he had understood the claimant had been dismissed for incompetence;
- (4) That those minutes could have been clarified by John Coomber if he had attended the Tribunal hearing and also he could have clarified the telephone call with the claimant, but he did not give evidence. It was said he was ill but there was no certificate produced to verify this. In any event his witness statement did not deal with any of these issues;
- (5) John Coomber took or received statements from Mr Johal and Mr Chinthala and concluded that the claimant had resigned on the Wednesday, giving three days' notice.

### Conclusions

34. In respect of the factual dispute it is clear from my findings of fact that I preferred the claimant's evidence and I find that the claimant was dismissed on 29 June when he was told to "fuck off" and go and live on his pension. If I am wrong in that then I find he was dismissed on 3 July when Mr Chinthala turned up to take over the factory.

### Unfair Dismissal

35. There is no need to recite the law on unfair dismissal, save that of course the respondent has to follow a fair procedure, and given that the claimant was dismissed on the spot no procedure was followed. Therefore, the claimant's dismissal was unfair.

### Contributory Conduct

36. The respondent said any award for unfair dismissal should be reduced for contributory conduct under section 123(6) Employment Rights Act 1996. In **Nelson vs BBC No 2 (1980) CA** it was established that contributory conduct has to be blameworthy or culpable.

37. The respondent relied on the events in June, however this was insufficient to establish contributory conduct. The claimant had good reasons for the two matters which arose. The client was not being very difficult about the matters and it was resolved quickly.

Polkey

38. The respondent argued that the claimant would have been dismissed anyway under the **Polkey vs AE Dayton Services Ltd (1988) HL** principle. As far as the respondent argues the claimant could have been fairly dismissed for some other substantial reason, this is unsustainable as first of all the respondent has not pleaded “some other substantial reason” properly having conflated it with capability, and have never set out in their pleadings what they rely on for “some other substantial reason”.

39. Insofar as it was the claimant's performance in driving away customers the evidence was simply too thin to establish this and there was no documentary evidence of any difficulties other than the ones in June where the emails did not show any particularly difficult problem.

Wrongful Dismissal

40. The claimant was wrongfully dismissed. There were no grounds for a summary dismissal on the grounds of gross misconduct and therefore the claimant is entitled to his notice pay. Unfortunately, due to there being no contract of employment it is not possible to ascertain what the notice pay is and this will have to be decided at a remedy hearing.

Failure to provide written particulars

*Findings of Fact*

41. The claimant was not provided with written particulars by way of a contract of employment as alleged in Mr Johal's evidence. That evidence fell away under cross examination when it became clear that he had no actual knowledge of the claimant being sent a contract of employment. Mrs Johal had stated there was nothing in the personnel file other than details of the claimant's address, date of birth, etc., her brother had dealt with contracts before the respondent had got Peninsula involved in 2015, so again she had no direct evidence of a contract being sent out.

42. I am prepared to accept from my own knowledge that in general when Peninsula is engaged they would seek to ensure their clients sent out written contracts to all their employees, and it was advanced that the claimant had been sent Manchester employees' contracts between 2015 and 2017 and some were actually signed and returned, albeit there was no actual evidence produced regarding this. While I would accept the general contention that this process occurred, there was absolutely no evidence that the claimant had been provided himself with a contract. If he had his contract would have to have been bespoke to some extent; it may have had similarities with other General Managers in Swindon and London but it would have been based on conditions particular to his situation.

43. In those circumstances it is inconceivable that there would be no template or draft, either on Peninsula's system or the respondent's system, or even a printed out contract, unsigned, in the personnel file. The respondent had contended the claimant had refused to sign the contract of employment, however if this was true I would

have expected to see a blank contract in the claimant's personnel file and there was absolutely nothing.

44. There was no argument put forward by the respondent that the claimant had received his employment particulars by some other route.

45. Accordingly I find that the claimant was never sent a contract of employment and therefore the respondent had failed to comply with section 1 of the Employment Rights Act 1996.

Employment Judge Feeney

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Date: 19<sup>th</sup> November 2018

REASONS SENT TO THE PARTIES ON

21 November 2018

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FOR THE TRIBUNAL OFFICE

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