EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss V Cane	v	**C. McDonald Brown Limited**

PRELIMINARY HEARING

Heard at: **Hull** **On:** **01 May 2019**

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr G Price of Counsel**

JUDGMENT

1. The Claimant was dismissed within the meaning of section 95 of the Employment Rights Act 1996.
2. The dismissal was unfair.
3. The Respondent shall pay the Claimant compensation amounting to £1465.37.
4. The Claimant's complaint of breach of contract is well-founded and the Respondent shall pay the Claimant £1246.14.
5. The Employment Protection (Recoupment of Jobseekers allowance and Income Support) Regulations 1996 do not apply to any element of the above awards.

REASONS

Background.

1. The Tribunal heard oral evidence from the Claimant.
2. The Tribunal heard oral evidence from the following witnesses for the Respondent: –

2.1. Mr Christopher Brown Senior, managing director of the Respondent.

2.2. Miss Helen Yeomans, Associate and company secretary with the Respondent.

2.3. Mr Christopher Brown (son of Mr Mc Donald Brown)

2.4. The Tribunal had before it an agreed bundle of documents which contained 30 paginated pages.

Issues

3. **Dismissal**

3.1. Was the Claimant dismissed within the meaning of section 95 of the Employment Rights Act 1996 ("ERA96") or did she resign?

3.2. If the Claimant was dismissed what was the reason for the dismissal?

3.3. The Respondent does not plead a potentially fair reason for dismissal and no disciplinary procedure was undertaken. It is conceded by the Respondent therefore if the Claimant was dismissed the dismissal must be unfair.

3.4. Did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged? ("the Contribution issue")

4. **Breach of contract.**

4.1. If the Claimant was dismissed it was conceded she was not dismissed for gross misconduct and thus would be entitled to contractual notice of 9 weeks' pay.

5. **Other Matters.**

5.1. Although in the Respondents response there is reference to the principle set out in **Polkey -v- AE Dayton Services Ltd 1988 ICR 142,** this was expressly abandoned by Mr Price.

5.2. There was also reference in the Claimant's claim for the sum of £150 being owned but it was agreed that the sum in dispute and been paid by the Respondent.

6. **The Law**

6.1. Section 95 ERA96 sets out what constitutes a dismissal.

6.2. A Claimant cannot claim unfair dismissal unless they have been dismissed within the meaning of section 95.

6.3. Section 95 states that an employee is dismissed by the employer if

"(a) the contract under which he is employed is terminated by the employer (whether with or without notice)

(b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which is entitled to terminate it without notice by reason of the employer's conduct."

6.4. The burden of proof is upon the Claimant to establish dismissal within the statutory definition and the standard of proof is the balance of probabilities.

6.5. If the Claimant had resigned then there cannot be a dismissal and thus both her unfair dismissal and breach of contract claim must fail.

6.6. From the authorities the following principal can be derived. Where there is said to be ostensibly ambiguous words, whether they amount to a dismissal or resignation is an objective test and the Tribunal must have regard to all the surrounding circumstances, both preceding and following the incident, and the nature of the workplace in which the misunderstanding arose.

6.7. The Tribunal must then, if the words are still ambiguous, must ask itself what a reasonable employer or employee would have understood the words in the light of those circumstances.

6.8. If, however the words are unambiguous that they should be taken at their face value without the need for any analysis of the surrounding circumstances, **Sothern -v- Franks Charlesly and Co 1981 IRLR 278.**

6.9. The authorities also point to the fact that words spoken in the heat of the moment by an employee or an employee been jostled into a decision by the employer, may mean that it is appropriate for the Tribunal to investigate the context in which the words were spoken in order to ascertain what was really was intended and understood. What applies to an angry or emotional resignation may also apply, but more rarely, to an angry dismissal, **Martin-v-Yeoman Aggregates Ltd 1983 ICR 314,** although the circumstances must be exceptional as the general rule is that once notice to terminate a contract has been given it cannot be withdrawn unilaterally but only by agreement between the parties, **Harris and Russell Ltd -v- Slingsby 1973 ICR 454.** Thus, the giving of notice of termination of the contract by the employer even if it is a mistake, once given, cannot be unilaterally withdrawn.

7. **Contributory conduct.**

7.1. Section 123 (2) ERA 96 states that where the Tribunal *"considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...".*

7.2. The wording in relation to any deduction from the basic award differs from that in section 123 (6) ERA 96. In this particular case it was only necessary for the Tribunal to look at contribution in relation to the basic award.

7.3. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

7.3.1. The relevant action must be culpable or blameworthy

7.3.2. It must have caused or contributed to the dismissal, and

7.3.3. It must be just and equitable to reduce the award by proportion specified.

7.4. However, the **Nelson** test does not apply to a reduction in the basic award to the extent that there is no requirement that the such conduct must cause or contribute to the Claimant's dismissal, rather than its fairness or unfairness.

8. **Breach of Contract.**

8.1. In assessing compensation for wrongful dismissal, the Claimant is entitled be put in the same position as if the employer had properly performed the contract.

8.2. In **Norton Tool Company Limited -v- Tewson 1972 ICR 501** it was held that an employee is entitled to unfair dismissal compensation covering the period from the date of his or her dismissal to the date when notice, had been properly given expired, even though the employee has obtained fresh employment during that period.

9. **Submissions.**

9.1. Both parties made submissions and I mean no disrespect to either party by not repeating those submissions which concentrated upon the interpretation of what was said to be the facts.

9.2. Mr Price did refer me to the decision of the employment appeal Tribunal in **Kwik-Fit (GB) Ltd -v- Lineham EAT/250/91** and the general principles of law set out therein, none of which the Tribunal disputed.

10. **Findings of Fact.**

10.1. The following findings of fact do not cover each and every evidential point that was in dispute but only address those findings required to address the identified issues.

10.2. For clarity a reference to "Mr Brown" is a reference to Mr Christopher Brown senior unless the contrary is indicated.

10.3. The Respondent is a small financial service company based in Hull.

10.4. The managing director is Mr Brown.

10.5. It operates from Mr Brown's home

10.6. The company employs four people.

10.7. The Claimant commenced her employment with the Respondent on 02 February 2009.

10.8. The Claimant's job entailed audio typing, administration and general reception duties as and when required.

10.9. She was contracted to work 16 hours per week.

10.10. She was entitled to notice, if dismissed by the Respondent, to one week for each complete year of service.

10.11. She was paid, net £600 per month by means of 12 monthly payments. This equates to a figure of £138.64 pw. The Claimant's net and gross was the same as she was below the tax and national insurance limit.

10.12. The Claimant was born on 12 October 1976.

10.13. The Claimant is a single mother and has faced financial pressures as a single mother. She needed to work to live.

10.14. In the Tribunal's judgement the relationship between the Claimant and Mr Brown had become less amiable in the last 12 to 18 months than had previously been enjoyed between the two parties.

10.15. The nub of this case relates to the events on Thursday 04 October 2018.

10.16. Prior to Thursday 04 October 2018 the Claimant had a clean disciplinary record and had not been subject to any form of improvement or performance plan.

10.17. It is helpful at this stage to describe the physical arrangements within Mr Brown's home.

10.18. The Claimant worked in a very large room, approximately 36 feet long.

10.19. Her desk was at the opposite end to glass patio doors which led into a conservatory. The conservatory was part of Mr Brown's house are not used for business purposes.

10.20. The doors were certainly single glazed and may well have been double glazed.

10.21. Vertical blinds covered the doors and at all material times relevant to this matter, the blinds were closed.

10.22. Ms Yeomans worked in an office on the other side of the hallway to the Claimant's office. In other words, for the Claimant to visit Ms Yeomans she would need to open her office door, traverse quite a wide hallway and then go into Ms Yeomans office.

10.23. The working arrangement was that in relation to typing Mr Brown would dictate and then give that dictation to the Claimant. She would then transcribe the typing on to her computer and email the document to Mr Brown. He would check and amend as appropriate and then return it to her for printing.

10.24. On Thursday 04 October 2018 the Tribunal found an incident took place at around 11 o'clock in the morning.

10.25. The Tribunal determined that the Claimant had transcribed a tape for Mr Brown and sent it to him by email. Mr Brown was unhappy with the quality of the typing and came into the Claimant's office to remonstrate with her.

10.26. The Claimant was unable to determine what mistakes it was said she had made because Mr Brown, by altering the letter of his own computer, had overwritten the original. The Tribunal found the Claimant apologised if she had made an error. The Tribunal found that Mr Brown was annoyed and he accepted that he used the phrase *"get it right"* to which the Claimant agreed and also Mr Brown said on a number of occasions *"not good enough, not good enough."*

10.27. The Claimant contended Mr Brown then said words the effect that he *"didn't pay peanuts and therefore didn't expect to employ monkeys"* which the Claimant found offensive. This was disputed by Mr Brown. On the balance of probabilities, the Tribunal found that he did use such a phrase for the following reasons.

10.28. Firstly, Ms Yeomans accepted it was the sort of phrase that she had heard Mr Brown use the past.

10.29. Secondly, Mr Brown himself frankly admitted it was a phrase that he had used, but not on this occasion.

10.30. Thirdly, it is noticeable that in the Claimant's letter of 8 October 2018, a letter the Tribunal will return to later in this decision, when the Claimant notified Mr Brown, she had secured alternative employment she said *"not bad going for a trained monkey"*. In the Tribunal's judgement this was a reference back to the criticism Mr Brown made up her on Thursday 04 October 2018.

10.31. Fourthly, Mr Brown was annoyed and it is the sort of phrase a person might use if they were displeased.

10.32. There is no dispute that following this comment the discussion became heated and Tribunal accepted the Claimant's evidence that there was some gesticulation from Mr Brown. It was not disputed that the Claimant then said *"I don't need this shit".* The fact the Claimant admitted using what the Tribunal considers to be an unpleasant and disrespectful phrase, added to the Claimant's credibility, in the Tribunal's judgement.

10.33. At this juncture is appropriate Tribunal records that the Tribunal found the phrase *"I don't need this shit"* to be an ambiguous statement. It could mean that a person was resigning but equally it could be a request to desist a course of behaviour. The Tribunal found as a fact that the phrase used by the Claimant was a reference to Mr Brown's attitude towards her and she did not intend to resign her employment. The Tribunal found the Claimant's evidence that she would not resign without a job to go to due to her financial position to be compelling.

10.34. Mr Brown contended that the Claimant then told him to *"stick your job"* Mr Brown contended that the Claimant had resigned. The Claimant denied any such utterance.

10.35. The Tribunal rejected Mr Brown's evidence for the following reasons.

10.36. Firstly, the Tribunal having had the opportunity to observe Mr Brown found it highly unlikely that he would simply, as he claimed, leave the room if the Claimant had resigned

10.37. Secondly, the Claimant remained in her office and continued to undertake office tasks which again is inconsistent with a resignation.

10.38. Thirdly, it was common ground that the Claimant did not enjoy a firm financial position and had encountered money problems in the past and thus would have been extremely reluctant to resign without another job to go to.

10.39. Mr Brown Jr claimed that he was absent from work due to sickness (he did not work for his father) and was in the conservatory and heard the Claimant say *"I don't need this shit"* and *"stick your job".*

10.40. The Tribunal considered this inherently unlikely that he heard anything for the following reasons.

10.41. Firstly, Mr Brown Jr accepted that he was watching television in the conservatory when he allegedly heard the words spoken. The television would have hindered his ability to hear a conversation.

10.42. Secondly, he claimed to have heard a conversation through closed patio doors and closed blinds where the minimum distance between the two was over 36 feet.

10.43. Thirdly although Mr Brown Jr claimed he recalled the above words exactly; he could not recall anything that his father, Mr Brown said.

10.44. What is not in dispute is the Claimant was working on the photocopier/scanner, scanning some documents when Mr Brown came into her office about five minutes later.

10.45. The Tribunal is satisfied that it was at this point that a further discussion took place which again was heavily disputed. Mr Brown contended that he told the Claimant he accepted her resignation, she was to go home for the day and consider her comments, and she quietly left having handed over the keys and emptied her desk. The Claimant's version was that the papers were taken off that she was scanning, she was told to hand over her keys and empty her desk as her resignation had been accepted.

10.46. The Tribunal preferred the Claimant's version. Given that the Claimant's case was she had not resigned she took the behaviour of Mr Brown to amount to dismissal. At this juncture the Tribunal observes that if the Claimant was a dishonest witness, she could have said that Mr Brown expressly told her that she was dismissed or used the word "dismissal". That was not her evidence. This was a further factor added to the Claimant's credibility.

10.47. A factor that Mr Price was right to emphasise, and a factor that assisted the Respondent, was that the Claimant did not immediately object or dispute that she resigned. The Tribunal however concluded that the Claimant was in a state of shock. Ms Yeomans accepted the Claimant put her head round her office door and was visibly upset and close to tears and that she was not normally an emotional woman. Further it was conceded the Claimant did not actually remove all the personal effects. The Tribunal concluded this was consistent with a person who was upset and flustered and being pressured to get out of the building, rather than invited to go home and reflect on events. In the circumstances therefore, the Tribunal did not attach any significance to the fact the Claimant did not immediately remonstrate that she had not resigned.

10.48. The Tribunal preferred the account of the Claimant for the following reasons.

10.49. Firstly, the Tribunal found the Claimant to be an entirely credible and convincing witness. She gave her evidence without hesitation. She readily conceded points when put to her. She gave evidence which, whilst not in a Ms Yeomans statement, was corroborated by Ms Yeomans when questioned upon it. The Tribunal is not saying that Mr Brown was dishonest, rather that the Claimant was a more impressive and credible witness.

10.50. Secondly, the fact the Claimant stayed at work and carried on with her duties is more consistent with the Claimant not having resigned, following her interaction with Mr Brown.

10.51. Thirdly, the Tribunal accepted that the Claimant was asked for the keys and told to empty her desk which is consistent with a dismissal rather than, as Mr Brown contended, an instruction that she simply go home for the day and consider her comment. There was no reason to request the keys if Mr brown considered she had acted in haste and he expected her to return. The same principle applies to emptying her desk.

10.52. The Claimant was not at work on Friday as she had already booked that day off as holiday as she had made arrangements to take her daughter to London by train to see a show for her birthday.

10.53. Telephone discussions did take place, probably on the Friday and Saturday between the Claimant and Ms Yeomans as, at the time, they were friends. The Tribunal accepted Ms Yeomans evidence, who it found again to be an honest and open witness, that she had been told by Mr Brown, after he taken legal advice, to invite the Claimant to a meeting on Monday, 8 October at 2.30 to *"clear the air".*

10.54. She was not instructed to tell the Claimant that she had not been dismissed, or that any dismissal was retracted, or that any resignation was not accepted. Further there was no communication from Mr Brown to the Claimant relating to the incident of 04 October 2018.

10.55. The Tribunal found, and this was accepted by Ms Yeomans, that the Claimant was nervous about coming to a meeting at 2.30 because sometimes Mr Brown had a "liquid lunch". She did not, however, seek to rearrange the meeting.

10.56. On Sunday 07 October 2018 the Claimant was at a friend's house and explained that she believed she been dismissed and was advised that her friend's mother, who ran a company, Fairburn Associates, was looking for administrator, working 16 hours per week. The Claimant and her friend's mother had known each other for many years and a telephone call ensued in which the Claimant was offered employment working 16 hours per week at exactly the same rate as she enjoyed with the Respondent. Thus, the Tribunal concluded that the Claimant certainly considered by Sunday 07 October 2018 that she had been dismissed by Mr Brown.

10.57. On 08 October 2018 the Claimant sent a letter via email to Mr Brown which reads as follows-

"Following the verbal attack I endured from yourself on Thursday 4th October (and countless other occasions) and then be asked to hand over my keys to the office and clear out my desk immediately, without prior verbal or written warnings, it is at which time you made it clear my services on the longer required.

I have since gained alternative employment (not bad going for a trained monkey) and asked that my P45 is forwarded as soon as possible.

Please ensure all outstanding pay is paid into my bank account needed"

10.58. The Tribunal found that this document to be of considerable significance because it is the only contemporaneous document of events and was written well before the Claimant sought any form of legal advice.

10.59. The letter is more consistent with the Claimant's account than the Respondents.

10.60. Having received the letter Mr Brown did not respond either in writing, orally directly or via Ms Yeomans, to indicate that he disputed the letter. Whilst the failure to respond is not to be equated in the Tribunal's judgement as acceptance, when all the evidence is looked at holistically the Tribunal has concluded that it is the Claimant's evidence of the events of 04 October 2018 that were to be preferred.

11. **Discussion.**

11.1. The Tribunal is satisfied the Claimant use the words *"I am not taking this shit"* in response to gesticulations and a comment from Mr Brown that he *"didn't pay peanuts and therefore didn't expect to employ monkeys".*

11.2. In the Tribunal's judgement the phrase *"I am not taking this shit"* was ambiguous. Applying an objective test and looking at all the surrounding circumstances and in particular how the comment came to be made the Tribunal is not satisfied that phrase could be reasonably taken as an unequivocal resignation. Mr Brown should have sought clarity as to what the Claimant meant.

11.3. The Tribunal found it significant when looking at all the circumstances that the Claimant continued to work and is satisfied she would have worked her contractual hours had it not been for the fact that Mr Brown then came into her office after about five minutes, took the papers off her that she was scanning, took her keys from her and told her to empty her desk.

11.4. Whilst it is true Mr Brown did not use the word dismissal and said he was accepting the Claimant's resignation the Claimant had not resigned. The Tribunal concluded that telling an employee to leave, taking their keys from them, and telling them to empty their desk was sufficiently clear for the Claimant to reasonably believe that she had been dismissed. The Tribunal is fortified in that view by the fact the Claimant was clearly distressed when she said goodbye to Ms Yeomans and the fact, she looked for alternative employment.

11.5. The Tribunal is satisfied that it was mere happenstance that the Claimant obtained employment so quickly. There was no evidence that she been applying for work elsewhere or was seeking to leave. In fact, her new employment was at no greater rate of pay and she lost the benefit of her car been filled with diesel approximately twice a month by the Respondent.

11.6. Given the Tribunal found that the actions of the Respondent amounted to a dismissal the Tribunal must then consider, applying **Martin-v-Yeoman Aggregates Ltd 1983 ICR 314,** whether there are exceptional circumstances such as to amount to withdrawal of what may have been an angry dismissal. The Tribunal reminded itself that the general rule is that dismissal once given cannot be withdrawn without the consent of the other party.

11.7. The reality is that at no stage was the Claimant told that her dismissal had been withdrawn. At best Mr Brown asked Ms Yeomans to telephone the Claimant to seek to set up a meeting on Monday, 11 October 2018 to clear the air. He could have telephoned the Claimant immediately after the incident on the Thursday to make it clear that she remained employed. He could have done the same on the Saturday or Sunday. He could have emailed the Claimant. He did none of these.

11.8. Thus, the Tribunal concluded the Claimant was dismissed by the Respondent.

12. It was agreed that if the Claimant was dismissed any dismissal was unfair and thus the Claimant was entitled to a finding of unfair dismissal.

13. Turning to remedy the Claimant indicated she was seeking compensation only.

14. The Claimant is entitled to a basic award.

15. Her weekly pay was £138.46.

16. Both parties agreed the multiplier was 9.5.

17. Given the Claimant was not dismissed for gross misconduct the effective date of termination is adjusted under section 86 and section 97(1) and (3) ERA96 and thus she has a multiplier of 9.5 when calculating the basic award, and this was agreed by Mr Price.

18. It follows therefore the Claimant was entitled to a basic award of £ 1315.37 (9.5 x £138.46)

19. Is it appropriate to make any deduction from the basic award by reason of the concept of contributory conduct? The Tribunal reminded itself that it must consider whether it would be just and equitable to make such a reduction. The Tribunal considered that the events of 04 October 2018 was such that each party, both the Claimant and Mr Brown, did not behave well. In such circumstances it would be inappropriate for an adjustment to be made for the Claimant's contributory conduct namely the phrase *"I don't have to take this shit"* taken into account the events that led to that comment. In the Tribunal's judgement making a typing mistake, which the Claimant accepted was possible, given her long service and clean record the Tribunal did not consider this was behaviour that it was such that it was just and equitable to reduce the basic award.

20. Given the Claimant obtained alternative employment starting on 08 October 2018 with the same number of hours and the same rate of pay she had no loss of earnings.

21. An issue did arise as regards a loss of an apparent benefit. Neither party could identify when it started but it was agreed the Claimant was permitted by Mr Brown, once or twice a month, to fill up her VW Golf motorcar with diesel using the company credit. This was an ad hoc arrangement. It was not embodied in any form of contractual documentation. There was no agreed figure as to how much diesel could be obtained. The Tribunal noted that the relationship between the Claimant and Mr Brown had become less amiable in the last 12 to 18 months. The Tribunal concluded that the benefit was not contractual and could have been withdrawn at any stage. Whilst the Tribunal acknowledged that the case law does not require, in every case that the benefit was contractual, given

its ad hoc nature and lack of certainty it concluded it was not appropriate to take the matter into account in assessing the Claimant's loss.

22. It was agreed by Mr Price if the Tribunal found for the Claimant she was entitled to a loss of statutory rights and he agreed the rather miserly figure claimed in the Claimant's schedule of loss, drafted by her then solicitors, of £150 and I make such an award.

23. It was agreed that this was not a case of gross misconduct and that if the Claimant had been dismissed by the Respondent, she was entitled to statutory minimum notice of one week for each full year of service. It follows therefore the Claimant would be entitled to an award of nine weeks' pay.

24. Mr Price argued with some force that effectively this would mean the Claimant would receive a windfall because she would not be required to take into account the fact that she had obtained alternative employment within the notice period. Whilst accepting that subsequent judicial decisions have sought to limit the principle in **Norton Tool Company Limited -v- Tewson 1972 ICR 501** it still remains good law that as a matter of what is known as good employment practice a Claimant should not be required to bring into account earnings received during the contractual period. The Respondent is therefore not entitled to set off the Claimants earnings against contractual notice.

25. Further the Respondent cannot offset the basic award against the earnings received during contractual notice.

26. The Tribunal accepted the position may well have been different if a compensatory award was being made. However, here no compensatory award was being made.

27. Whilst the Tribunal has some sympathy that it would appear the Claimant obtains a windfall the Tribunal was satisfied that it must award the Claimant nine weeks' notice which amounts to £ 1246.14.

28. The Recoupment Regulations 1996 do not apply to the basic award or the damages for breach of contract.

Employment Judge T R Smith

Sent to the parties on:

8 May 2019