



# EMPLOYMENT TRIBUNALS

## BETWEEN

Claimant  
MR P O'LEARY

AND

Respondent  
VAUGHN BROTHERS FUNERAL  
DIRECTORS LTD

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF      ON:    10TH APRIL 2018

EMPLOYMENT JUDGE P CADNEY (SITTING      MEMBERS:  
ALONE )

APPEARANCES:-

FOR THE CLAIMANT:-      MR G EVANS

FOR THE RESPONDENT:-    MR C HOWELLS

## JUDGMENT

The judgment of the tribunal is that:-

1. The claimant was unfairly dismissed by the respondent.
2. The claimant was wrongfully dismissed by the respondent.
3. The respondent is ordered to pay the claimant the (agreed) sum of £14, 307.80

## Reasons

1. This is the decision of the tribunal in the case of Paul O'Leary v Vaughan Bros Funeral Directors Ltd. By this claim the claimant brings claims of unfair and wrongful dismissal.

### Date of Commencement of Employment

2. The first issue is the date of commencement of employment. The issue is only of significance in relation to calculating the basic award for unfair dismissal in the event that the claimant's claim succeeds. The claimant began work for the respondent in 2001. The claimant asserts that it was 1 October 2001 in his claim form, although in evidence he suggests that it was at some point in early October as he had ceased work in his previous employment in a factory at the end of September 2001. The respondent asserts that in fact it was 1 November 2001. There is no direct evidence before me in respect of either of these dates. The respondent's assertion is apparently based on the date on his first payslip which arose from a discussion between Mr Smith of the respondent and his accountant but that payslip is not in the bundle and is not before me. In the circumstances, in particular in the absence of any clear evidence from the claimant as to the date, I have decided to accept the respondent's, albeit hearsay, account of the information from the accountant and accept the date of commencement as 1/11/2001.

### Facts

3. Prior to the claimant's dismissal the respondent company had only three employees, Mr Smith, the claimant and the claimant's brother Mark O'Leary.
4. The events which led to the claimant's dismissal began in the latter part of 2016. There were two incidents, one on 29 September of 2016 in which the incorrect service sheets were put out at a funeral. The fault was not the claimant's although he was criticised for not noticing the error. The second was a road traffic collision on 26 October 2016 where a vehicle being driven by claimant drove into the back of one being driven by Mr Smith. No disciplinary action was taken in respect of either incident at the time.
5. The evidence of the respondent is that between that date and 21st July 2017 that the claimant's behaviour and attitude deteriorated, and that he was perceived by others as negative and harming the business. The claimant accepts that there was one conversation about his negative attitude at some point in the early part of 2017 but states that he was never given any details of, or information as to the source of these allegations. No disciplinary process was started at the time and there was no repetition of those allegations.
6. Matters came to a head on 21 July of 2017. Mark O'Leary had told the claimant that he was going on holiday and would resign when he returned. The claimant went to speak to Mr Smith, and it is not in dispute that when he did so Mr Smith said words to the effect that if anybody left it would be the claimant. The reason for that is that Mark O'Leary had told Mr Smith that he was shortly to go on holiday and that when he returned he expected the claimant to have been dismissed; and that if he hadn't been he Mr Mark O'Leary would resign. Mr Smith's evidence is that Mr Mark O'Leary

was extremely important to the business and that he could not risk Mr Mark O'Leary resigning and so a decision was effectively reached at that stage that the claimant's employment would be terminated.

7. In a letter dated 23 October 2017, in describing the events of 21<sup>st</sup> July Mr Smith stated "...you approached me asking if it was right that Mark O'Leary was leaving, I replied that if anyone was to leave it would be you..... I told you it was my intention to terminate your employment and that it would be done properly as to when I didn't know. I told you that I would seek advice as to the procedure." It follows on the basis of this letter that it is the respondent's case that a decision had been taken to terminate the claimant's employment on 21<sup>st</sup> July 2017.
8. On 24th July there was a discussion between Mr Smith and the claimant and it is not in dispute that Mr Smith told the claimant that he wished to come to an agreement to terminate claimant's employment by means of a without prejudice agreement. The claimant states that the conversation went further and that Mr Smith stated that in the event that there wasn't such an agreement that an the claimant would be charged with gross misconduct. Whatever precisely occurred it is not in dispute that whilst Mr Smith had indicated that he it was his intention to terminate the claimant's employment, that at that point the claimant had not actually been dismissed.
9. The claimant was off sick from 25 July 2017 until 3 October 2017. He returned on 3 October and on that day he was sent home by Mr Smith. Mr Smith's evidence is the reason for that is that he did not believe that the claimant was in a fit mental state to work, whatever the GPs fit note said, and that for that reason he sent the claimant home. The claimant's evidence is that on 3 October he was informed by Mr Smith that he had been sacked although Mr Smith said he was not clear whether he had been sacked in July or whether he was now being sacked in October.
10. Thereafter all the events which led to the claimant's dismissal are contained in correspondence. On 6<sup>th</sup> October 2017 at the claimant sent an email stating, "*Dear Mr Smith please could you forward me my statutory right to a written statement of reasons for my dismissal..*" and asking for his P45 and any holidays in lieu that were owing to him were paid. There was no specific response to that email and certainly no response indicating that the claimant's understanding that he had been dismissed was incorrect.
11. On 13 October 2017 Mr Smith wrote saying "*Re disciplinary meeting. I'm now in a position to put my reasons for your dismissal from the company to you in writing.*", and inviting the claimant to a meeting 16th October 2017. On 14th October the claimant wrote an email saying that that date of 16th October was not convenient, and by a separate letter set out a number of requests among which were, "*The date on which you allege that you dismissed me.*", "*The full reason in writing for the dismissal*", and "*Furthermore I do not understand why I am required to attend on 16<sup>th</sup> October when I've already been dismissed.*"
12. Those points did not receive a specific reply, but on 16<sup>th</sup> October Mr Smith wrote saying, "*Further to my letter of 13th October and your email reply of 14 October I*

*have rescheduled the meeting to take place Monday next 23 October 2017” and goes on “The purpose of the meeting is to present you with my reasons for your dismissal from the company.”*

13. On 18th October 2017 the claimant wrote to Mr Smith inviting a response to his letter of 14th October, and stating *“Furthermore I see no reason why should attend a meeting when you’re required to put reasons for my dismissal in writing to me”*.
14. The claimant did not attend the meeting of 23<sup>rd</sup> October. On 23<sup>rd</sup> October Mr Smith wrote. He firstly set out his recollection of events of 21<sup>st</sup> July 2017 (as set out above) and referring to the two incidents in September and October 2016. In addition he states, *“Finally I have received a formal complaint that you disclosed information about a death that we attended overnight to your wife and that she then went on to disclose the information in her workplace that led it to being in the public domain before family members were made aware. This is a family who we have served previously but found this not of the standard they would normally have come to expect from the company. You have seven days in which to reply.”* That related to incident in February 2017 which was the subject of a complaint in August 2017.
15. On 25th October the claimant wrote again saying, *“Further to my two letters dated the 14<sup>th</sup> and 18<sup>th</sup> of October.... I require you to provide me with written reasons for my dismissal..... I would be obliged if you would now respond with urgency to my requirements. You have in fact confirmed in your letter dated 16th October that I have been dismissed. The relevant paragraph is paragraph 2 “The purpose of the meeting is to present you with my reasons for your dismissal from the company”. I am therefore entitled to the reasons in writing.”*
16. On 28<sup>th</sup> October the claimant replied to the letter of the 23<sup>rd</sup>, referring back to his three letters of the 14<sup>th</sup>, 18<sup>th</sup> and 25<sup>th</sup> October, and again asserting that he had been dismissed, and asking for details of the complaint and all other matters are first requested on 14 October.
17. On 3 November Mr Smith wrote (purportedly terminating the claimant’s employment) saying, *“I have offered you on two separate occasions an opportunity to attend Penuel Funeral Home for me to set out my reasons for your impending dismissal from the company. You did not attend either. The purpose of the meetings was to me to set out my reasons and for you to have the opportunity to respond. Subsequent letter dated 23<sup>rd</sup> October to you did just that. However following your fit for work note dated 25 September 2017 given the date for your return to work as 3<sup>rd</sup> October 2017 you have received weekly wages in full from this company (Willingly accepted even though you deem your employment have been terminated). Information is come to my attention whilst you been in receipt of wages from my company have the same time been working for TJ Brown & Sons Funeral Directors..... Therefore to bring this matter to a conclusion accept this as notice of termination of your employment with Vaughn Brothers (Funeral Directors) Ltd with immediate effect.....”*
18. The reference and in the letter to the claimant working for TJ Brown & Sons it is a reference to the fact that information apparently was provided to the respondent that

the claimant was working for that other funeral director. As a result they commissioned surveillance of him between the 24<sup>th</sup> and 26<sup>th</sup> October of 2017. On 26<sup>th</sup> October 2017 he was observed on the premises of TJ Brown and Sons, and on 27<sup>th</sup> October it's not in dispute that he assisted at a funeral being conducted by TJ Brown and Sons. For the avoidance of doubt the evidence of the claimant and Mr Brown is that the claimant was assisting on that day but was not being paid, and was therefore not "working" for TJ Brown and Sons. This issue is only really relevant if I conclude that the dismissal occurred on 3<sup>rd</sup> November 2017, but for the avoidance of doubt accept the evidence of the claimant and Mr Brown as to his attendance at the funeral on 27<sup>th</sup> October.

### Unfair Dismissal

19. In respect of unfair dismissal the first question is therefore when the claimant was dismissed. There are a number of possibilities. The first is the 3<sup>rd</sup> October 2017 when the claimant submits that he was orally dismissed. The second is (as is the respondents pleaded position set out at a number of points in the ET3) that the claimant was dismissed on 23 October 2017. The third is the respondent's current position which is that the date of dismissal was 3 November 2017 which is the date of the last letter referred to above and which is the date Mr Smith asserted in evidence that he believed was the date of dismissal.
20. I have set out above the correspondence in which the claimant repeatedly asserts from 6<sup>th</sup> October onwards his understanding that he had been dismissed. He was at no point in the course of the correspondence informed that that understanding was wrong. Moreover in my judgment the letters of the 13<sup>th</sup> and 16<sup>th</sup> October can only be read as an acceptance that he had been dismissed, and that the reasons for that dismissal were to be supplied to him. It follows that in my judgement the claimant is correct to assert that he was dismissed on 3<sup>rd</sup> October 2017.
21. The next question then is what was the reason for dismissal? As at 3<sup>rd</sup> October 2017 it is not the respondent's case that the claimant had in fact been dismissed and therefore there is no specific fair reason put forward. As a matter of pure technicality therefore it would appear inevitable that the claimant's case for unfair dismissal will succeed in any event.
22. However, as is set out above however there are a number of different reasons given by the respondent as to why the claimant was dismissed. As of today the primary reason put forward by the respondent for dismissing the claimant is as set out above that his brother had given the respondent an ultimatum at some point prior to the 21<sup>st</sup> July 2017. I accept Mr Smith's evidence that that was said to him. However what is notable, in terms of the fairness of the dismissal, is that it does not appear anywhere in the contemporary documentation, does not appear anywhere in the ET3, and was not put to the claimant at any stage prior to his dismissal, whichever date of dismissal is accepted. In my view it is transparently unfair for the claimant to be dismissed for a reason of which he was wholly unaware, and had not been given any opportunity to answer.

23. The pleaded reason for dismissal in the ET3 are that he was dismissed for the reasons set out in her the letter of 3 November and/or 23 October and/or for failing to attend the meeting on 23 October. The letter of 3 November does not in fact set out any specific allegation. As is set out above the letter of 23 October refers to the two incidents in 2016 and an incident which apparently occurred in February 2017 and was the subject of a complaint in August 2017. The claimant was only given details of those matters by the letter of 23 October and even on the respondent's case was dismissed on 3 November in circumstances in which he had not been given a specific opportunity to answer those allegations; and in circumstances in which the respondent knew that he was asserting that he had already been dismissed. That that was the reason he did not understand what the purpose was of attending any such meeting. In my judgement to dismiss the claimant in those circumstances without informing him that he had not been dismissed and without giving him a proper opportunity to answer those allegations would clearly be unfair even if the claimant had been dismissed on 3<sup>rd</sup> November. In addition the conclusion that the claimant had committed an act of gross misconduct by failing to attend the meeting in circumstances where the respondent knew that he understood that he had already been dismissed and was not disabused of that notion is one that is very difficult to sustain. It appears to me on any analysis no reasonable employer could have concluded that the failure to attend the meeting was in and of itself an act of gross misconduct.
24. It follows that although I have concluded claimant was dismissed on 3 October in circumstances that were unfair that at whatever point and at whatever date he was dismissed that dismissal would have been at least procedurally unfair.

#### Polkey Reduction

25. Although the respondent did not concede that the dismissal was unfair the crux of the case and the thrust of the submissions relates to a Polkey reduction. The essence of the respondent submission is the ultimatum having been given by the claimant's brother that it was inevitable, even if a fair procedure had been followed, that the claimant would have been dismissed. There are in my view a number of difficulties with this proposition. The first this is not a case in which the respondent considered the substantive merits of that case at all; and the claimant was not given any opportunity either to dispute the basis for his brother's ultimatum or to be given the opportunity, given that they were brothers and had both of them worked for the respondent for some sixteen years to some form of reconciliation. There is no evidence before me that Mr Smith at any stage after 21<sup>st</sup> July revisited with Mark O'Leary the basis for that ultimatum and whether it was still maintained.
26. However it is the duty of the tribunal to speculate to an extent as to what would have happened. It follows that there must be some prospect that the claimant would have been dismissed if a fair procedure had been followed. Doing the best I can it appears to me that there is a twenty percent chance that he would have been dismissed if a fair procedure had been followed, and therefore a twenty percent Polkey reduction.

Contributory Fault

27. On the basis of the evidence before me I cannot identify any contributory fault on the part of the claimant.

Uplift

28. Given the wholesale failure to follow any fair procedure I have decided to award a 20% uplift

Wrongful Dismissal

29. In respect of wrongful dismissal there is no evidence before me that at any stage at the claimant had committed any act of gross misconduct which will allow the respondent to dismiss him summarily and accordingly the claimant's claim for wrongful dismissal must be upheld.

Remedy

30. Following my earlier decision the parties have reached agreement as to remedy:-

- a) Basic Award - £9291.00
- b) Compensatory Award (Los of Earnings) - £4666.80
- c) Uplift - £933.36
- d) Loss of Statutory Rights - £350
  
- e) Total - £14,307.80

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**EMPLOYMENT JUDGE**

**Dated: 24 April 18**

Sent to Parties  
4 May 2018



