



EMPLOYMENT TRIBUNALS

Claimant: Jason Drew

Respondent: Tina Roberts t/a New Park Motors

Heard at: Bodmin **On:** 26 June 2019

Before: Employment Judge Housego

Representation

Claimant: Simon Emslie, of Counsel

Respondent: In person

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The respondent failed to provide terms and conditions of employment to the claimant.
3. The award falls to be reduced by 1/3rd by reason of the claimant's contributory conduct.
4. The award is to be increased by 25% by reason of non observance of the Acas Code.
5. I order the respondent to pay to the claimant £800 for not supplying terms and conditions.
6. I order the respondent to pay to the claimant £3,516 for unfair dismissal.
7. For the avoidance of doubt the total is **£4,516**.

REASONS

1. Mr Drew worked as a motor mechanic at New Park Motors. He started work there in 2011. The garage was a partnership between Tina Roberts and Geoff Newson. Ms Roberts bought out Mr Newson after the dismissal.

Mr Newson was a witness for Mr Drew: all agree that the sole respondent should be Tina Roberts t/a New Park Motors. He had worked there for over 6 years by the time he was dismissed. He is a good mechanic.

2. I heard evidence from Ms Roberts and from Mr Drew and in his support from Mr Newson. Ms Roberts lives on site, Mr Newson lives next door and Mr Drew about 10 minutes away.
3. Mr Newson wanted to leave the business. This was only accomplished recently, but was in mind at the time of these events. He had a bad back and his wife had been ill. A new mechanic, Jamie Bellringer, was recruited and started work in October 2018, to cover Mr Newson's work. Ms Roberts wanted the garage to become an MoT testing station. She recruited Leon Harvey to be the tester. He came from the same garage as Jamie Bellringer. Mr Harvey was on the application form as the nominated tester. That application was submitted on 31 October 2018 and approved on 20 November 2018. Mr Harvey gave notice to his employer, another local garage, where this garage took its MoT work. Leon Harvey had not started work by the time Mr Drew was dismissed. Mr Drew thought, for reasons not material, that Mr Harvey did not like him. Ms Roberts had told Mr Drew that Mr Harvey thought Mr Drew a good mechanic: nevertheless Mr Drew was apprehensive about Mr Harvey joining, and felt somewhat marginalised, as Ms Roberts was involving Jamie Bellringer in a lot in things that before she would speak to him about.
4. Mr Drew was concerned at whether his employment was at risk, by reason of these changes, the recruitment of others and his feeling of marginalisation. He was also unhappy that work was to be taken from the garage where Mr Harvey worked, which was where they took their MoT work. Ms Roberts reassured him about his future. Ms Roberts had been told by Mr Newson that Mr Drew was looking for work elsewhere. However nothing of any significance happened before 07 December 2018.
5. On 07 December 2018 Mr Newson was not in the garage, having gone to collect or deliver a customer's car (why he was not there is not relevant). Ms Roberts looked in at the "crib room" (why it is so named is not material) and told Mr Drew that an order for a new ramp had been confirmed. She did so as Mr Drew had been worried that there would be more staff than ramps, and that he might be the one to go without.
6. Sometime later that day Mr Drew came to the office. Ms Roberts and Mr Drew do not agree on who was where, and it matters not. There is a basic level of agreement about what happened and some disagreement.
7. What is agreed is that Mr Drew expressed some concerns. Ms Roberts said that she thought Mr Drew was discussing her affairs with others, which Mr Drew took as equivalent to slander. He was not happy about the new MoT bay. Ms Robert became agitated and said something like "*Why are you gossiping about my fucking MoT bay?*" and asked why he, Mr Drew was still there: that is why had he not taken any of the jobs she had heard that he had been offered. Mr Drew said that he was not going anywhere.

8. The accounts then vary, but what is agreed is that Ms Roberts then said that 3 years ago Mr Drew had run his finger along the inside of her thigh, following which comment he slammed his fist or palm on the desk and angry words were spoken by both, including that Mr Drew said that he had never told a lie in his life, that at one point their faces were close together and that Mr Drew then left. No one else was present.
9. I asked both Ms Roberts and Mr Drew for a full account of what happened, because the accounts in the witness statements and the claim and response forms were not a clear narrative. Largely I prefer the account of Mr Drew, first because it is the more coherent of the two, secondly because it is the more plausible and thirdly because of the inconsistencies in Ms Roberts account.
10. Mr Drew's account (and these are facts I find) is that he went to the office to look at the booking diary for the following day. Ms Roberts was at the doorway having a cigarette. He entered the office and she left the doorway and sat down. She started the conversation by saying that she was 50 and had only 2 relationships and then out of blue said something like *"and by the way there will be a big wages bill when Leon comes"* and then made the comment that only 2 people had ever come on to her and one was him when three years ago he had touched her leg, saying that he had run his finger up the inside of her thigh when showing her photographs of his fishing spots and suggesting that she come with him. That was when he had banged the desk, said that, no, he hadn't and said that he had never told a lie. Ms Roberts was *"right in my face and she shouted "Get out", slung the chair back and then got out of office before me and then she stood on tiptoe and said "You're only a little bloke what you going to do?" then she got in car and left."* At some point in the conversation the discussion that it is agreed happened (set out above) took place: when is unknowable in the context of a row.
11. Ms Roberts account has varied. In the ET3 response Ms Roberts wrote *"On 7 December Jason said he had not discussed my personal life but had just enquired about a job. I said to Jason about the time when I was sat at my desk and he ran his finger down my thigh. This was three years earlier. He slammed his fist on the desk leaned right over up to my face and said he had never told a lie in his life. He was very angry, aggressive and intimidating. I got up from my chair and said what are you going to do? I repeated it. He did not leave the office until I did, and he followed me into the workshop. I then drove a car out and left the garage."*
12. In her witness statement Ms Roberts put *"On the afternoon of December 7 I was sat at my desk when Jason came into the office. Geoff [Newson] had gone to Truro and one of the mechanics was in the workshop. Jason and myself were not alone in the garage as he stated. Jason spoke again his job at the MoT Bay. Most employers I would think only need to reassure an employee once of the safety of their position. Jason was clearly irate about my comment on how a customer was not happy with the manner in which Jason dealt with the issues on his vehicle. The customer was considering returning to the garage when Geoff was back another day until I reassured him we would have his vehicle ready for him to collect on time. Jason said I was moaning about what the wages*

will be when the MoT bay is in when I was making it clear we would need to work together as a team when the MoT day is operating. Jason got very angry very quickly when I mentioned him discussing the MoT Bay. He seemed to want a confrontation and there was no need for him to be in the office. He hammered his fist on the desk, leaned right down to my face and said he had never told a lie in his life. This was very intimidating violent and aggressive... I got up from my desk and said twice to him what are you going to do? He said I am not going to hit you. I replied I never said you were. I said to him to go into the workshop that he repeated it and initially just stood there. I then went into the workshop and got into a car with him standing right next to the driver's door and I drove it out of the workshop and took it for tracking and retest."

13. This omits all reference to the finger/thigh comment which she put in the ET3, and which she confirmed in oral evidence she had said. In her oral evidence it was very hard to get a clear account. I fully understand that if a woman is frightened it may be very hard to give a clear account. However what Ms Roberts was unable to account for was why she made the comment in the first place. She was clear that Mr Drew became angry only after (and because of) it.
14. Ms Roberts was clear that Mr Drew became angry after she made the comment, but although in her oral evidence the topic was explored for some time, Ms Roberts was not able to give a coherent account of why she had said it in the first place. She also agreed in oral evidence that she made another comment attributed to her by Mr Drew, that in all the years she worked in the motor trade only two people had made advances to her, but again was not able to explain why she said this, other than to say that she accused Mr Drew of talking about her personal life. Asked what she meant, it was her personal affair of installing an MoT bay, but that is not personal in the sense of relationships or improper advances. This is inexplicable save on the basis put by Mr Drew.
15. Mr Drew's account was clear on this point, but less clear on others: he said in oral evidence that he was not unhappy about opening an MoT bay and recruiting people, but in his witness statement he said precisely the reverse; he was not happy with poaching staff and business from the MoT centre to which they referred most of their business. I take this into account. I find that Mr Drew was persistently and consistently being somewhat negative about the changes in the garage, and was concerned about his future.
16. Contrary to Mr Drew's evidence I find that Mr Drew banged the desk at which Ms Roberts was sitting, which was how it came about that they ended up nose to nose shouting at one another.
17. Mr Drew says he was asked to remove his papers from the office: Ms Roberts denies this. He did remove them, both agree. I attribute the difference to misunderstanding. There were going to be a lot of changes and it is very likely that the office will have needed to be tidied and reorganised. This dispute of evidence neither indicates that Mr Drew was looking to leave nor that Ms Roberts was trying to force him out.

18. I do not find that Ms Roberts was trying to get him to leave. He is a good mechanic and reliable. She would need to replace him. I accept Mr Drew's evidence that on 07 December 2018 Ms Roberts made reference to the size of her wage bill. She was becoming sole owner, had replaced Mr Newson with an employee, and was taking on another. This is a small business. She was at the same time buying out Mr Newson and investing in equipment. It is unsurprising that money was much on her mind. I do not accept that she was trying to provoke him to leave.
19. Returning to the facts, Mr Newson then returned to the garage, very soon afterwards. He saw that Mr Drew was in something of a state, and sent him to take a car to another garage in order to clear his head. Ms Roberts then returned to the garage and he spoke to her. Mr Drew then returned and all three spoke together. Of the three accounts I heard of this meeting Mr Newson's is probably the clearest. They do not differ very much. All agree that it was said that things had been said in the heat of the moment, by both Mr Drew and by Ms Roberts. Mr Newson's clear impression is that this was putting matters behind them, everyone shook hands with everyone else, everyone ought to go home, it being fairly late on Friday afternoon, reflect over the weekend and have a further discussion on Monday to make sure things moved forward properly. Ms Roberts said that Mr Drew stuck out his hand and she felt obliged to shake it, but then matters were overtaken by events because Mr Drew's parents arrived. At this point Ms Roberts had not considered dismissal.
20. I am conscious of the fact that Mr Drew senior has not given evidence and is not here to put his side of the account, but the fact is that the evidence of all three witnesses is identical. Mrs Drew was driving. Mr Drew senior got out of the car and advanced towards Ms Roberts, clearly very angry, shouting and swearing at her and jabbing his finger at her. Mr Drew intervened, placed his palms on his father's chest, stopping him advancing and telling him to go. At Mr Newson's suggestion Ms Roberts left and went home, Mr Drew left also, Mr Newson then calmed Mr Drew senior down and he and his wife left about 10 minutes later.
21. Ms Roberts then did some internet research and decided that this was gross misconduct for which summary dismissal was appropriate. On Monday she caused his P45 to be sent to him and it arrived on Wednesday 12th December 2018. It was not accompanied by a letter of dismissal, and nor did she speak to Mr Drew. Ms Roberts' research led her to believe this was unnecessary in such cases, and a letter had to be provided only if the dismissed employee asked for it.
22. In the meantime Mr Newson who was, and remains, on a friendly basis with Mr Drew contacted him on the Saturday (08 December 2018) to see how he was. Mr Drew was very distressed and so Mr Newson said to him that he should take some days sick leave. On Monday Mr Drew went to the doctor and was signed off from work, and given that conversation was not expected to be at work on the Monday. Plainly there was a discussion between Mr Newson and Ms Roberts because she was not expecting him at work either. Where Mr Newson and Ms Roberts differ is that Ms Roberts says that they discussed how much notice pay to give Mr Drew (even though for summary dismissal notice pay is not necessary). Mr

Newson's account is that on Monday Mr Drew told him that money had gone into his account that day, but there was no discussion between him and Ms Roberts about two or four weeks' pay, and the first he knew of the dismissal was when Mr Drew told him on Wednesday of the arrival of the P45.

23. Ms Roberts was clear that she and Mr Newson had an entirely satisfactory business partnership of some years duration. There is no reason for Mr Newson to be untruthful about this, and I accept his account as correct.
24. On these facts, the reason for dismissal was clearly conduct, as Ms Roberts asserts. That is a potentially fair reason.
25. The next issue is whether this was fair or not, applying the test set out in Section 98(4) of the Employment Rights Act 1996. That brings in the *Burchell* test – was there a genuine belief on reasonable grounds after proper investigation?
26. There was no need for an investigation; the matter involved Mr Drew's interaction with one of the two partners in the business who took it upon herself to make the dismissal decision based on that one incident.
27. Plainly the incident happened, and everyone agrees that it involved Mr Drew banging the desk and shouting and swearing by both.
28. The issue in this case is about fairness. Here, I note that at the time of the meeting of the three of them Ms Roberts had not decided upon dismissal. I take account of the fact that she might have wished to reflect upon matters before so doing, and that Mr Drew senior came on the scene almost immediately, but I have accepted Mr Newson's evidence that the discussion effectively settled matters.
29. In her oral evidence Ms Roberts accepted that the involvement and actions of Mr Drew senior were a factor in her mind when she decided to dismiss Mr Drew, which decision she made over the weekend. Ms Roberts criticises Mr Drew for telling his parents anything. I accept Mr Drew's evidence that he speaks to his parents frequently, that his mother rang him soon after the incident (of which she will not have known) heard that he was distressed, asked why and that he told her about this; I accept that he did not ask them to attend and was surprised when they did. Plainly he told his mother the account that he has given since, which is why they decided to attend.
30. Ms Robert's criticism of Mr Drew in this regard is unfair. Mr Drew did all that he possibly could when faced with the unexpected intervention of his father.
31. Ms Roberts' extraordinary accusation of Mr Drew provoked him into the response that he made. It came out of the blue and was said to have happened 3 years before.

32. Because Mr Drew's action was a reaction to this highly provocative accusation, because the dismissal was decided upon at least in part by reason of the actions of Mr Drew senior, for which Mr Drew was in no way responsible, and because the dismissal decision was taken alone, without consultation with her partner, Mr Newson, I find the dismissal to have been unfair.
33. I do not consider that a reduction is appropriate by reason of *Polkey* – what would have happened had a fair procedure been followed? The unfairness was not procedural but substantive.
34. Next I consider contributory conduct. Mr Drew was faced with the provocation I have described. His reaction may have been expected to be considerable, but it was aggressive, and some reduction is appropriate. Logically there is a conundrum because without the intervention of Mr Drew senior there may have been no dismissal at all. Mr Drew's overreaction was in part by reason of his negative sensibilities at this time, although Ms Roberts had assured him that his job was secure.
35. After considering all these factors I consider that a reduction of one third is appropriate.
36. Any award has to factor in the total non observance of the ACAS code, and be increased by 25%.
37. Ms Roberts accepts that at no time was the claimant given a contract of employment, and his claim in that regard succeeds. He never asked for one, and the appropriate award is two weeks' pay in those circumstances.
38. I turn to the calculation of remedy. For failing to provide terms and conditions the award is two weeks' gross pay. Mr Drew was paid £400 weekly, and so that is **£800**.
39. The basic award is of 6 weeks' pay, at £400 a week, and so £2,400 reduced by 1/3rd, and so £1,600.
40. The compensatory award is made up of loss of statutory industrial rights and loss of income. £500 is claimed for loss of statutory industrial rights and I find this to be a reasonable amount. I so award.
41. The situation about loss of earnings is somewhat complicated. Mr Drew was paid until 21 December 2018. He commenced self-employment on 21 January 2019. He works as a locum mechanic at various garages as and when he feels he wishes to do so, and if they have the need. He also sometimes works for Mr Newson, who has established his own motor business. He works at various garages for his customers, and the garages do not charge him for his use of their workspace. Mr Drew does not supply the parts, and so all the parts he uses come from the garage at which he is working. Occasionally the customer will supply his or her own parts. Mr Drew tells me that he has chronic fatigue syndrome and also some metal plates in his anatomy. Ms Roberts was very good to him about not overloading him with heavy physical work. He says he would find it difficult, for example, to change a gearbox every day. The garage

from which the two new employees at New Park Motors came was, plainly, two mechanics down because they had moved to this garage. Mr Drew did indeed have discussions with that garage and he agrees that could have worked there. He says that he did not wish to do so because he was concerned that they would not be as sympathetic to him as Ms Roberts had been in terms of allocation of work. Other small garages have working conditions that are not acceptable to him. He was concerned that the garage from which the other mechanics had come dealt with a lot of small commercial vehicles and camper vans which are much heavier work than ordinary cars.

42. His earnings of self-employed are less than he was earning with the respondent. His locum pay rate is still £10 an hour so he is not better off as a locum mechanic than as an employed one.
43. In some ways Mr Drew's decision to become self-employed is one of choice. Ms Roberts says that it is difficult to get skilled mechanics, and Mr Drew agrees. Mr Drew's reluctance to take on new salaried employment for fear that he will be made to work on a higher percentage of physically hard work, or that other employers' mechanics will overload him with work is no reason why such employment should be refused. Given the shortage of good mechanics, any sensible employer will want to make adjustments for Mr Drew just as has Ms Roberts. There is no medical evidence of what Mr Drew says, but Ms Roberts accepts that she adjusted his work as he claims, and for those reasons, although also pointing out that he never had a day off sick by reason of chronic fatigue syndrome.
44. Balancing all these factors, I do not think it appropriate to require Ms Roberts to pay for Mr Drew's choice to become self-employed, although fully bearing in mind that he has had to make a choice because of his dismissal. Ultimately, he has to try new employment if available, and it was. If he chooses not to do so for fear that it may be unpalatable that is not the respondent's fault. There is no shortage of work that Mr Drew can undertake, and he is up to three or four days a week now, six months after starting.
45. In all the circumstances I think it reasonable for Mr Drew to have spent some time thinking about what he wanted to do and seeking alternative employment, and a month's pay covers that, from 21 December 2018. The world always slows down a little over the Christmas / New Year. It is likely that a new job would be at a similar rate of pay. His self employment was a reasonable decision because there is work to be had. It will inevitably take time to build up work, but as employed work is available it is nor fair to Ms Roberts for her to make up the whole shortfall.
46. Overall I consider that 6 weeks' pay reflects the loss of income to Mr Drew arising from his dismissal. At £340 weekly that is £2,040.
47. I add the loss of statutory industrial rights, or £500 to give an overall figure of £2,540.
48. From this I deduct 1/3rd, which is £847, leaving £1,693. I add 25% to this, which is £423, increasing the figure to £2,116.

49. The basic award does not fall to be increased by 25% as this applies to the compensatory award only. It is £1,600 and so the total award for unfair dismissal is £1,600, plus £2,116 = **£3,716**.
50. The total payable is the award for non provision of terms and conditions of £800 plus the unfair dismissal award of £3,716 making a total of **£4,516**.

Employment Judge Housego

Date 27 June 2019