



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr. Mark Rudland
(2) Mr. Damien Rudland

Respondent: Yorkshire Windows and Doors Ltd

Heard at: Hull **On:** 13 December 2019

Before: Employment Judge R S Drake (Sitting alone)

Representation

Claimants: In person
Respondent: Mr. M Howson (Consultant)

JUDGMENT

1. The Claimants' complaints of unfair dismissal under Sections 94 and 95(1)(c) Employment Rights Act 1996 ("ERA") fail and are dismissed in that they have not established they were expressly or constructively dismissed.
2. The Claimants' complaints of breach of contract fail and are dismissed.
3. The First Claimant's complaints of entitlement to holiday pay for five holiday days accrued but not paid succeeds and he is awarded Judgment in the sum of £400 which the Respondents shall pay to him.

REASONS

INTRODUCTION

1. I heard these two claims together as they related to the same set of facts and relied on the same evidence. I heard oral testimony from the Claimants themselves. I also heard evidence for the Respondents given by its Managing Director Mr. Christopher Hornby and one of its managers Mr. Andrew Lister. I considered many documents referred to me by all of the witnesses which appeared in combined joint bundle. Lastly, I heard detailed submissions from Mr. Howson for the Respondent and from the

Claimants themselves. After giving Judgment and explaining Reasons, I advised that a more detailed statement of Reasons would follow which are set out below, and that they take precedence over the oral Reasons. I refer to the Claimants as "C1" and "C2"

THE ISSUES

2. I concluded that I had to determine the following issues: -

- (i) What was said at the meeting between the Claimants and Mr. Hornby on 7 March 2019?
- (ii) Did the words used amount to clear and unambiguous express dismissal or alternatively a desire to dismiss falling short of unambiguous dismissal as such?
- (iii) If the words used were ambiguous, how would they be interpreted by a reasonable observer i.e. objectively?
- (iv) If the words used are not interpreted as dismissal, did the Claimants resign by their actions in not staying at or returning to work or staying to face potentially disciplinary process following this meeting?
- (v) If the words used by Mr. Hornby did amount to dismissal, can he show he had a potentially fair reason in mind for dismissal and can the Tribunal be satisfied he acted reasonably in all the circumstances in relying on the reason shown as a sufficient reason?
- (vi) Can C1 establish he was not paid his full holiday pay entitlement and if so, what is the quantum of that claim?

THE FINDINGS OF FACTS

3. The Tribunal made the following findings of fact: -

- 3.1 The claimants were at all material times a father and son team of window and door fitters. The Respondents are and were at all material times engaged in the business of supplying to domestic customers doors and windows and the service of the fitting of them via the engagement of fitting teams such as the Claimants.
- 3.2 The Claimants' cases turn upon the appropriate interpretation of the words used by the parties in a conversation which took place at the respondent's premises on 7 March 2019. The context of that meeting included the fact that in the past, the relationships between the Claimants and Mr Hornby were marked by a candid and brusque mode of address verging on being mutually disrespectful, but otherwise there was a degree of mutual respect in that in particular Mister Hornby regarded the Claimants as a good team fitters and sound workmen, whilst the Claimants regarded Mr Hornby as a forthright businessman.
- 3.3 It was common ground but there had been an altercation between C1 and Mr Hornby by telephone on 6 March 2019 which had been heard and remarked upon by my other employees of the Respondent. It does not matter what the cause of this altercation might have been. However, it caused Mr Hornby to regard the tone and manner in which he was addressed as being insubordinate and rude, so he felt he had no alternative but to discipline the Claimants and indeed in the ET3 says he intended to dismiss them. The

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question I have to determine his whether in the meeting which took place the next day he got as far as dismissing them before their employments were terminated by his words or by their actions.

- 3.4 According to the Respondents, the words uttered by Mr. Hornby on that date at a meeting in the Respondent's offices started with "Chaps I think we may be approaching the end of the road", followed by "nobody speaks to me like you did yesterday Mark". This he says was followed by the departure from the meeting by both Claimants. In contrast, C1 says Mr. Hornby started with "This is my company" followed by "I am not having anyone speak to me the way you spoke to me yesterday" followed by "So I think we have come to the end of the road" concluding with "I want you gone". C2 says something slightly different in respect of order of events but rather closer to Mr. Hornsby's account. C2 says Mr. Hornby said "Right I think we have come to the end , this is my company" followed by "I am not having anyone speaking to me the way you spoke to me yesterday" concluding with "I want you gone".
- 3.5 Whatever was said, the Claimants left the office abruptly, despite C1 trying to stop C2 and Mr. Hornby saying that C2 was just as much affected by what was happening. Then, C1 returned within seconds and said (according to him) "I'll take you to Tribunal" or (according to Mr. Hornby) "I'll see you in Court" - in either case signaling finality. Thus, the Claimants showed their clear unambiguous intention to leave employment, whether or not in their own minds or objectively they were justified in doing so. They later exchanged a conversation with Mr. Lister who had been present throughout, and who was embarrassed because he was both a loyal employee of the Respondents and was surprised by the Claimants' attitude and behaviour, and he is and was a friend of both of them at a personal level.
- 3.6 I found all witnesses, but especially Mr. Lister, to be candid and as honest as they could recall. They were forthright, and in the case of Mr. Lister I found his testimony very telling as he was a neutral to what he heard and had no overbearing reason to be biased either way, in fact the opposite.
- 3.7 On a narrow balancing of the evidence resolved particularly by the recollection of Mr. Lister who couldn't recall Mr. Hornby saying "I want you gone" I find it more likely than not on a balance of probabilities that those words were NOT used, but that Mr. Hornby did say to the Claimants " This is my company and I am not having anyone speak to me the way you spoke to me yesterday"
- 3.8 I also find Mr. Hornby is more likely than not to have intended to dismiss the Claimants, but that he never got as far as saying so (or doing anything likely to lead to dismissal such as commencing a disciplinary discussion) before they walked out and signified finality of their perceptions and intentions by emptying their van and threatening litigation.
- 3.9 C1 gave evidence on oath that he had been promised the right to carry over several untaken holiday days from a previous year but hadn't fully done so by the end of his employment and that there remained five days unpaid at £80 per day. Mt Hornby gave no evidence in response, so I prefer C1's testimony on this particular point.

THE LAW AND ITS APPLICATION

4. The relevant law borne in mind and applied by the Tribunal is as follows: -

4.1 In relation to the Claimant's complaint of unfair dismissal the relevant law is in Section 95(1)(a) which provides

"an employee is dismissed by his employer if the Contract under which he is employed is terminated by the employer whether with or without notice".

This provision is elaborated by the Court of Appeal's finding in **Sothorn v Franks Charlsley [1981] IRLR 278**. A Claimant must establish that an employer's conduct and/or the words he uses which the Claimant asserts constitute dismissal are unambiguous and do not state future wish or intention and do not lack finality. In such a case, the interpretation to be put on them in law is the subjective view of the Claimant himself.

Otherwise if the words lack futurity and/or are ambiguous, they are to be interpreted objectively i.e. according to what a reasonable bystander would take them to mean.

In this case I have the testimony of an archetypal reasonable bystander in the person of Mr. Lister who did not take the words used by Mr. Hornby to be dismissal but he did take the actions of the Claimants at the end of and after the meeting to be signaling intention to terminate by them by threatening litigation.

3.10 On analyzing the words said by Mr. Hornby to have been used by him, I do not find there was an act of express dismissal of the Claimants by him. They go nowhere near far enough to show a present intention to terminate the Claimants' employments and cannot objectively be regarded as being an unambiguous act of bringing the relationship of employment to an end.

3.11 On analyzing alternatively the words attributed to Mr. Hornby by the Claimants ("I want you gone") they show a an expression of future desire i.e. what is to happen in the future and not what is to be regarded as a present intention or desire other than wanting but not actually effecting termination of the employments.

4.4 In relation to the Claimants' complaints of breach of contract (by not giving notice or paying in lieu), I note from my finding of facts that the Claimants effectively terminated their employments by their own actions of leaving before allowing Mr. Hornby to take any action he might have wished to take which might have but didn't actually amount to dismissal, so they were in breach of contract by not giving notice and forfeit the right to notice or pay in lieu. Their claims for breach of contract must also fail accordingly.

4.5 Because C1 was able to give me evidence on oath as to his claim for unpaid holiday entitlement and its valuation which the Respondent didn't match or meet with documentary or oral evidence, I had no hesitation in accepting

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C1 had establish his entitlement to 5 days holiday pay at "80 per day and thus a total of £400

Employment Judge R S Drake

Date:18th December 2019