



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Howd

**Respondent:** Mr A Bowlt trading as Bowlt Homes

**Heard at:** Newcastle Civic Centre

**On:** 18 March 2020

**Before:** Employment Judge Martin

## Representation

Claimant: In person

Respondent: Mr Lewis (Solicitor)

# RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.

# REASONS

1. The claimant gave evidence on behalf of his own behalf. The respondent, Mr C Bowlt (the respondent's son); Mr Alan Boag and Mr Alan Lennard, both independent sub-contractors, all gave evidence on behalf of the respondent. The Tribunal was provided with an agreed bundle of documents marked MTM1.

## The law

The Tribunal considered the following law:-

**2. Section 95(1) of the Employment Rights Act 1996** "For the purposes of this Part an employee is dismissed by his employer if:-

**(a)** The contract under which he is employed is terminated by the Employer (whether with or without notice);

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

**3. Section 98 of the Employment Rights Act**  
**Section 98 (1)**

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show(a) the reason (or, if more than one, the principal reason) for the dismissal.

**Section 98(4)**“the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer:-(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.”

5. The case of **J & J Stern Simpson 1983 IRLR 52** where the EAT held that in order to determine whether or not there has been a termination, the words used should be construed in the context of the facts of the case. If there is some ambiguity then it is necessary to consider whether a reasonable employer or employer might have understood the words to be tantamount to dismissal or resignation.

6. The case of **Haseltine Lake & Co. v Dowler 1981 IRLR 25** where the EAT held that in order for there to be a dismissal in law there has to be an actual date of termination as distinguished from “resign or be dismissed” when the job is terminated forthwith.

7. The well-known case of **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** where the Court of Appeal held as cited by Lord Denning – an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

8. The case of **Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347** where the EAT held that it is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

9. The case of **Hogg v Dover College 1990 ICR 39** where it was held that a fundamental change to the terms of employment could effectively entitle an employee to consider that he has been constructively dismissed. The question is whether the particular contract under which the employee was employed was terminated. This could occur where an earlier contract is withdrawn from him.

### **The issues**

10. The issues which the Tribunal had to consider was whether the claimant was dismissed or whether he resigned. In that regard, the Tribunal had to consider all the circumstances of the case including the circumstances preceding and subsequent to the events and what was said or done by both parties.

11. If he was dismissed when was he dismissed and for what reason? Did the respondent do or say to indicate that he was dismissing the claimant? Was the claimant given a new contract of employment? Did that terminate his earlier contract? The respondent acknowledged that they did not follow a fair procedure if the Tribunal finds that the claimant was dismissed.

12. Alternatively, did the Claimant resign? If so, when and what did he say or do to indicate that he was resigning?

13. Alternatively, did the claimant resign in response to a fundamental breach of contract on the part of the respondent? Was it a breach of an express and / or the implied term of trust and confidence in his contract of employment? Did any changes in the proposed new contract amount to a fundamental change to his contract of employment? What was the breach or breaches? Did the Claimant resign in response to that breach or breaches of contract? Did he affirm the contract in the meantime?

### **Findings of fact**

14. The respondent is a small builder, who operates his own business building houses and extensions in the north-east; mainly in Northumberland. He now has one employee, who is his son. He engages others to work for for him from time to time on a self employed basis. Mr Boag and Mr Lennard are both self-employed plasterers, who work for the respondent from time to time on large extensions. Mr Boag said in evidence that only about 5% of his work was for the respondent.

15. The claimant joined the respondent as an apprentice joiner in 2007. He was employed by the respondent from that time, although there were occasions when he was laid off ,if the respondent did not have enough work. The claimant had not been subject to any disciplinary sanction during his employment.

16. The claimant said that he always got lifts to work from the respondent except for the period from January 2019 - June 2019, when they were working up the road from his house. The respondent said that he often gave lifts to the claimant. He said that he always gave lifts to the claimant when they were working away from Northumberland for example in North Tyneside or Gateshead. The respondent said that there were times when the claimant made his own way to work, including getting the bus. Both claimant and the respondent agree that there was nothing in writing in the contract or otherwise stating that the respondent would give the claimant lifts to work.

17. The respondent said that, after the claimant was laid off he always offered him a new contract of employment. The claimant did not dispute that fact. The respondent said that the claimant did not usually sign the contract. The respondent did not insist on the claimant signing any new contract. The claimant did not contest this evidence. The respondent said he issued a new contract to the claimant following any lay off. He thought he was required to do this as a matter of law. The last contract of employment which the claimant signed was in 2014. That contract is that pages 25–27 of the bundle. It cites the place of work as the respondent's home address. It states that claimant will work 40 hours. His rate of pay at that time was £7.20. The claimant was offered a new contract when he returned to work with the respondent in September 2019. The respondent said that the changes were the claimant's address and rate of pay. The claimant said that he changed his address in 2017. He was on a new rate of pay since

February 2018, so he was not sure why he was offered a new contract. The contract was not signed by the claimant. The respondent says the hours of work were 8.30 - 5pm. The claimant said the hours of work were up to 4:30pm with a lunch break.

18. The claimant was laid off in July 2019. The respondent said he did not have much work and had to lay off both the claimant and his own son at that time. The claimant's father died during this time.

19. The respondent said that he was asked to complete a job in September 2019. The job was urgent and had over run. The respondent said he was reluctant to take on the job, but he did not have much work on, so agreed to take on the contract. He had to meet regularly with the customer. The respondent said that he took the claimant back on 9 September 2019 to work on the job, as well as his own son. At the time, the claimant owned his own transport, but his wife used the car. The respondent said he told the claimant that he would give him lifts for a couple of weeks and that he would then have to find his own way to work.

20. The claimant said that the respondent gave him a lift to work every day as he had done in the past. The claimant said that the respondent would pick him up from home or from the school after he had dropped the children off at school. He refers to various texts in the bundle (pages 29-46), which show the respondent saying "ow" which was shorthand for "on way" and the claimant texting to say where he was. On occasions, the texts refer to the claimant being at school. The claimant said that the respondent would pick him up from there. The respondent said that sometimes the claimant would get the bus. He refers to 2 occasions namely 24 / 25th September when the claimant got the bus, whereas the claimant said that the respondent picked him up from school on those occasions. The respondent says if he did not reply to the text from the claimant, then it meant he would not pick up. It is not clear at what time the claimant attended work on those occasions, when the respondent says that he did not pick the claimant up. The respondent's son said that the claimant would usually get a lift with his father, but that he did recall occasions when he thought he did not get a lift with his father, but could not recall those occasions or what time the claimant attended work on those occasions.

21. The respondent said that he used a van for work, but that he bought an estate car for the claimant to use to go to work. The respondent said that the claimant had previously used the company van to do his own jobs in the past and the respondent was not prepared to allow him to continue to do so. The respondent also said that, previously the claimant had asked him to take the children to school in the van, but he was not happy about doing that. That evidence was not disputed. The respondent said that he offered the claimant use of the estate car, but the claimant refused to use it and gave no explanation. The respondent said that the claimant might have refused to use it because he wanted to use the company as he had done in the past. The claimant said he would not have refused a car, if one was offered to him.

22. On Friday, 27 September 2019, the respondent said that the claimant called him "a fat bastard". He said he verbally warned the claimant about being offensive to him. The respondent said that the claimant with dismissive and said "kick my arse". The respondent said that the claimant threatened to take him to an employment tribunal. The claimant denied the incident.

23. On the same day, the claimant and respondent were travelling home in the respondent's vehicle, having left work earlier than normal at 2:30 p.m. A discussion took place in the car about their working hours. The Claimant said that the respondent told him he had to work until 5pm not 4:30pm and would not be paid for his lunch break. The claimant said then he asked about being paid the travelling time. The claimant said that he asked to be dropped off at the school and the respondent questioned him as to why his wife did not pick up the children from school. The claimant said that he missed a call from the respondent after picking the children up from school and called him back. The claimant said the respondent told him that he could not pay him for his lunch break and that he had to work till 5pm. The claimant said that he told the respondent that he could not work until 5pm because of childcare issues. The claimant says that the respondent told him to do it his way or he could "fuck off".

24. The respondent said that after the claimant returned in September he did not seem to be himself and did not seem to be coping well after the death of his father. The respondent said he telephoned the claimant after dropping him off at the school to try and find out what was wrong with him because when the claimant got out of the car he seemed upset. The respondent said that he told the claimant that he could use the estate car on his drive and asked him if you wanted to pop over and pick it up. He said that the claimant said that he was not doing it and the respondent told him not to keep asking him for lifts to work then. The respondent also said that he asked the claimant if he wanted a new contract. The respondent says this was to change his address and rate of pay. He said he told the claimant but it would be the same hours of work namely 8:30 am to 5pm. He said that the claimant said he did not want to work until 5pm and wanted to work until 4:30pm. The respondent says that he told the claimant that was only 37.5 hours. The respondent said the claimant asked to do 40 hours and be paid for his lunch break. The respondent says he told him he would not pay for his lunch break. He says that the claimant then hung up on the phone. The respondent says that he did not pay any employees for their lunch break. In evidence to the tribunal, the claimant said that he did not consider that he had been dismissed on 27 September 2019 after that telephone call.

24. On 30 September 2019, the claimant said that he waited to be picked up for work. He said that he sent a text to the respondent asking if he was picking him up. The respondent texted a reply "no" (Page 50). The respondent says that he had a meeting with the customer on site that morning. He says that he told the claimant about that meeting on Friday. The claimant did not dispute that evidence. The respondent says that he was on the site and could not pick the claimant up.

25. The claimant said he then got a telephone call from the respondent who told him that if you did not do what the respondent wanted he would not have a job. The claimant said he told the respondent he was not able to change his hours and the respondent told him that he was not able to provide him with lifts. He said that the respondent then told him to "fuck off". The Tribunal notes that there was a call made on 30th September - Page 51. The respondent says that he telephoned the claimant and told him very was not able to pick him up and to make his own way to work. The respondent says the claimant threatened to bring employment tribunal proceedings and said that he would get a couple of thousand pounds at least. The respondent denied that he had told the claimant to sign the new contract or to "fuck off".

26. The claimant did not attend work that morning or for the rest of the week. He did not contact the respondent. The respondent, in turn, did not contact the claimant either.

27. The claimant said that he started looking for work. He said that he was told about a job, so we went to the site to collect his tools on Friday 4 October 2019.

28. The respondent said the claimant came to the site. He said he was working on the roof and the claimant shouted to him. Mr Boag and Mr Lennard say that they were on the site and heard shouting. They recognised the claimant's voice. On cross examination the claimant suggested to Mr Boag and Mr Lennard that they were not on the site, because he did not see them and their cars were not outside. They said that they travelled to the site together to price a job and were present at the time. They had left their car in the car park.

29. The respondent, Mr Boag, and Mr Lennard all say that the claimant shouted up to the respondent and asked for his tools and said he was not coming back.

30. The claimant says that the respondent became aggressive and told him he could not have his tools back, because they were in the garage and not in the van. The claimant says that the respondent swore at him. The respondent denies swearing at the claimant. He says that he tried to get off the roof to follow the claimant to speak to him. Mr Boag and Mr Lennard said in evidence that the claimant asked for his tools back and said that he had another job to go to. Both of them said in evidence that they did not hear the respondent swear at the claimant.

31. The respondent said that the claimant turned off the electricity at the site when he left. The claimant said that he went to the police to report the fact that the respondent had kept his tools. The respondent said he sent a text to the claimant and told him that he would drop his tools off at the weekend. He left them at the claimant's front door.

32. On 7 October 2019, the respondent wrote to the claimant stating that he assumed from the claimant's lack of attendance on site, lack of contact, and then subsequent request for the return of his tools that he had resigned (page 52).

33. The claimant admits that he received that letter. He did not reply to the letter. He said in evidence that he did not reply because he considered that the respondent had dismissed him but he did not write or telephone the respondent to dispute the contents of the letter.

34. On 28th October 2019, the claimant wrote to the respondent requesting a copy of his employment contract (page 53a). He followed that letter up on 13 November 2019. Around the same time, the respondent wrote to the claimant to say he had not got his letter and had sent the contract to ACAS. On 20th of November 2019, the claimant wrote to the respondent regarding the issue about his resignation (page 57). It is not clear why the claimant had not written to the respondent prior to that stage to comment on the matter. By that stage of the claimant had been in contact with ACAS.

35. On 26 November 2019, the claimant issued proceedings in this tribunal. In his claim form he stated that his employment had ended on 27 September 2019. In Paragraph 8.2 of the ETI, he refers to the various incidents between 27th September– 4 October 2019. In relation to 4 October 2019, the claimant says

that the respondent told him to "fuck off" at the site. In his response form, which was filed by the respondent's solicitors on his behalf, it is stated that the respondent did not give lifts to the claimant at any time. In evidence the respondent said that was an error.

### **Submissions**

36. The claimant submitted that he was dismissed on 30 September 2019. He said that the respondent did not pick him up to give him a lift to work as he usually did. He said that the respondent told him to sign contract or to "fuck off", which he took as being dismissed from his employment.

37. The respondent's representative submitted that the new contract did not amount to a fundamental change in the terms of the claimant's employment. He submitted that the respondent did not insist on the contract being signed. He submitted that did not amount to a breach of contract on the part of the respondent. He submitted that the claimant resigned when he came onto the site on 4 October 2019 to collect his tools and told the respondent that he was not returning. The respondent's representative submitted that the respondent had written to the claimant to check whether he was resigning and had received no reply to that letter.

### **Conclusions**

38. This Tribunal has reminded itself that the burden of proof in this case is on the claimant to prove the dismissal as dismissal has not been admitted

39. The Tribunal finds the respondent did not dismiss the claimant on 27 or 30th September 2019. Even if the respondent had used the words alleged, the Tribunal does not consider that that would have been sufficient for the claimant to have considered himself dismissed in the circumstances in which those alleged words were used. The claimant himself said that the respondent used similar words on 27th of September 2019, yet the claimant did not consider himself dismissed on that occasion. It should be noted that the claimant suggested in his ET1 that he was dismissed on 27th September 2019, not as suggested in his oral evidence in tribunal, on 30th September 2019.

40. The Tribunal finds that the respondent did usually pick up the claimant. The Tribunal prefers the claimant's evidence in that regard, which is supported by the documentary evidence. However, the Tribunal also finds that the respondent told the claimant on the Friday afternoon that he had a meeting with a client on the Monday morning, which the claimant did not dispute in evidence. Therefore, the fact that, on 30 of September 2019 the respondent did not pick the claimant up for work, even if he used the alleged words would again be sufficient for the claimant in those circumstances to have considered himself to have been dismissed in the circumstances.

41. A reasonable employee in those circumstances would have made contact with his employer either by telephone, text, or in writing to clarify whether he had been dismissed (and if so, when and on what basis). However, in this case, the claimant made no attempt to contact the respondent to clarify the position before assuming that he had been dismissed. At that time, he had not received anything in writing or otherwise from the respondent to confirm the position. He should have checked the position before making the assumption that he had been dismissed. Further, even after the respondent wrote to him telling him that he

thought he had resigned, he still did not contact the respondent to correct the position until some months later and after he had instituted these proceedings.

42. This Tribunal finds that the claimant resigned from his employment when he attended at the site on Friday 4 October 2019 to collect his tools. By that stage, the claimant had not been at work for the whole of that week. The Tribunal also finds the claimant did tell the respondent at that time that he was effectively leaving his employment and thereby resigning. We accept the respondent's evidence in that regard, which is corroborated by two independent witnesses who had nothing to gain from their testimony. It is also supported by the claimant's own evidence that he went to the site to collect his tools because he had a job to go to. If the claimant had not resigned from his employment at that stage, then it was incumbent upon him to have responded to the respondent's letter to him asking him if he had resigned. He had the opportunity at that stage to clarify the position again, if he really believed that he had been dismissed already. However he chose not to do so. This Tribunal considers that that decision was fatal.

43. For those reasons, the Tribunal considers that the claimant resigned from his employment on 4 October 2019.

44. The Tribunal went on to consider whether the claimant had resigned at that stage in response to a fundamental breach of contract on the part of the respondent. The burden of proof is again on the claimant. However, he led no evidence to suggest that he had resigned from this employment on that basis. His case was that he believed that he had been dismissed. It is for the claimant to prove that he resigned because of a fundamental breach of contract on the part of the respondent and he has failed to do so. For those reasons, we do not find that the reason for his resignation on 4 October 2019 was because of any breach of contract on the part of the respondent.

45. For those reasons the Tribunal finds that the claimant's claim for an unfair dismissal is not well founded and is hereby dismissed

Employment Judge Martin

Date 8 April 2020