EMPLOYMENT TRIBUNALS

Claimant: Stephen Bird

Respondent: HB Commercial Limited

HEARD AT: Bury St Edmunds on 9 September 2020 (by CVP)

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr Jonathan Heard (Counsel)

RESERVED JUDGMENT

1. The Claimant's unfair dismissal claim is not well founded, and is dismissed.

2. The Claimant's breach of contract claim is not well founded, and is dismissed.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent from 1 June 2006 until February 2019, when he left work in circumstances amounting either to a 'simple' resignation (the claimant does not assert he was constructively dismissed), or an 'actual' dismissal for alleged misconduct/breakdown in trust and confidence

2. Following compliance with the Early Conciliation procedure, on 5 June 2019 he presented a claim alleging unfair dismissal, and non-payment of 1 months' notice.

EVIDENCE

3. I was referred to an agreed 52 page bundle of documents. I heard oral evidence from the Claimant. On behalf of the respondent, I heard from Mr Offord and Mr Brunt. All witnesses did their best to give full answers to

questions, despite the technological challenges which poor internet connection presented at the CVP hearing (which caused me to reserve my judgment, so that it would be put in writing). I was grateful for their patience.

4. I considered Mr Brunt to be a particularly clear and cogent witness.

ISSUES

5. The liability issues for me to determine today were as follows (it being agreed that any **Polkey/**contributory fault arguments would be determined at a separate remedy hearing):

Unfair dismissal

a. Was the claimant dismissed, or did he resign?
b. If the claimant was dismissed:
    i. What was the reason for dismissal? As to this, the respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of the Employment Right Act 1996 ("ERA"), alternatively, 'some other substantial reason' - namely, a breakdown in trust and confidence.
    ii. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
        1. Did the Respondent have reasonable grounds, for its belief that the Claimant was guilty of misconduct, or that trust and confidence was broken?
        2. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?

Unlawful deductions/breach of contract

c. Was the Claimant entitled to notice pay?

FACTUAL FINDINGS

6. The respondent is a relatively small family run business. The present owner, Mr Brunt, took over the business from his father. The Claimant was 60 years old at the time he left the respondent. He had worked there for some 14 years. Most recently, his primary function was as an MOT driver. He had some issues with the respondent in the past which suggested a measure of disgruntlement. For example, in early 2018, during a meeting to discuss operations, the claimant complained that when the new yard opened, the respondent was going to be in "even more of a mess". On 21 September 2018, he announced he was leaving the company, in the context of various issues relating to his driving licence and health. He told a colleague, Tom, that he was "leaving with immediate effect on the basis he is of no use to us". In fact, he returned to work soon afterwards.

7. On Thursday 30 January 2019, Mr Offord send an email to staff members explaining that specific car parking spaces had been allotted to staff members. He said: "if you could adhere to this it would be greatly

appreciated. Should any of you struggle to park in your allocated space due to lack of room to manoeuvre let me know and I will see if we can swap with another person".

8. The following day, the claimant was due to start work at about 8:00 AM. He arrived at the yard, to find that another vehicle was parked in his allotted space. He parked in another space instead. At about the same time, Mr Brunt had arrived on site in his car. The claimant approached him.

9. On the claimant's case, the claimant said to Mr Brunt "Ah, Oliver- where am I supposed to park?". Mr Brunt replied "well, you can always get in your car and go home". The claimant said he was confused and speechless at this, and that Mr Brunt repeatedly told him to go home. So, he did do so. He also said to Mr Brunt, "thanks a lot" (by which he meant, 'thanks for nothing').

10. In contrast, Mr Brunt's evidence was that as Mr Brunt got out of his car that morning, the claimant approached him in an agitated state and said "where am I supposed to park?" Mr Brunt was taken aback by the claimant's response, particularly as he had clearly already parked his car. He replied (accurately) "Steve, you have parked your car." He then said "if this has upset you so much, then it will be best for you to park your car at your home?" (The claimant lives about 9 miles away.) Mr Brunt accepted that this was a somewhat sarcastic response to an aggressive (though not physically threatening) and -he thought- inappropriate attitude on the part of the claimant.

11. The claimant then said "I've had enough of this place, it's a shambles, you cannot even park your car". Mr Brunt again told him "you have parked your car", and again told him he could always park his car at his house rather than bring his car to work. The claimant repeated he thought the business was "a shambles", declared he had "had enough", and said "I am off." He began to walk away, then turned round and attempted to shake Mr Brunt's hand (which Mr Brunt allowed him to do). He said "thank you for everything", and walked away. He did not return to work.

12. About 2 hours later, Mr Brunt sent an email to the claimant's partner. He did this because, I accept, this was the email address to which he usually sent correspondence to the claimant. His email reads: "after Steve's unacceptable outburst in the yard this morning followed by him giving me his verbal notice and leaving, can you confirm in writing that he has handed his notice in?"

13. The claimant received this email. However, he and his partner did not respond to it. Moreover, he did not return to work the next working day on Monday 4 February 2019. Indeed, he did not return to work at all. Nor did he seek to appeal his dismissal/bring a grievance.

14. Mr Brunt told me, and I accept, that if the claimant had responded to the 1 February 2019 email by saying (e.g.) that he had no intention of resigning, Mr Brunt would have let him carry on working.

15. On 4 February 2020, having taken legal advice, Mr Brunt (I accept) asked Mr Offord to produce a written witness statement that day setting out what

he had seen and heard on 1 February 2019. The statement corroborated the version of events set out above, and I accept that statement broadly reflected Mr Offord's honest recollection.

16. On 8 February 2019, Mr Brunt re-sent the email of 1 February 2019. (In so far as it matters, I accept from Mr Brunt that the email was re-sent that day, despite the claimant's evidence to the contrary.) Again, the claimant did not respond to the 8 February email -or, belatedly, the 1 February email.

17. On 1 March 2019, Mr Brunt sent the claimant a letter dated 28 February 2019 confirming that, having not heard back from him, Mr Brunt "reluctantly" accepted his resignation. On the same day, the claimant in an email asserted he hadn't been "paid money owed to me could you advise me as to why?" In cross examination, he explained this referred to notice pay and outstanding holiday pay.

18. It was only in a letter dated 16 April 2019 that the claimant finally set out his version of the events of 1 February 2019. Amongst other things, he said "off I went thinking next day all would be alright. I would have turned up for work despite the fact that I felt disrespected by you." In cross examination, he confirmed that he did not think he had been dismissed on 1 February 2019. Rather, he felt that Mr Brunt was "obviously in a bad mood" that day but would have a chance to "think things over" and things would be "ironed out".

19. I asked the claimant why, if that were the case, he did not simply return to work on 4 February or respond to the 1 February 2019 email at some point and explain that he had not resigned at all. The claimant was unable to give an answer, beyond saying that he was shocked by the 1 February 2019 email, and that when he read the email he didn't think he would be welcomed back if he returned to work. He said he felt "unwanted".

20. I am pleased to note that the claimant eventually found work elsewhere, albeit apparently at a lower wage.

THE LAW

21. Mr Heard referred me to two cases:

    a. **Kwik-Fit (GB) Ltd v. Lineham** [1992] IRLR 156. This is authority for the proposition that, even in the event of an apparently unequivocal resignation, some time ought to be allowed in an industrial setting for the employee to reconsider their position when tempers have cooled. Where 'special circumstances' exist, an employer should allow a reasonable period of time to elapse before accepting a resignation at its face value, during which facts may arise which cast doubt upon whether the resignation was really intended and can properly be assumed.
    b. **Willoughby v. CF Capital PLC** [2011] IRLR 985. There, it was held the general rule is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be with-drawn except by consent. The "special

> circumstances" exception is not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or other-wise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted. In appropriate cases, the recipient of the notice of resignation or dismissal will be well advised to allow the giver what is in effect a "cooling off" period before acting upon it. The exception should not be characterised as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal, since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. The true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place, that, in effect, his mind was not in tune with his words.

APPLICATION TO THE FACTS

22. Very often cases such as this turn on the version of events relating to an alleged dismissal. Unusually, this is not such a case. The claimant does not assert that he was *in fact* dismissed on 1 February 2019. Nor does he suggest that he resigned in circumstances amounting to a constructive dismissal (e.g. breach of the implied term of trust and confidence). Rather, he says that the content of the 1 February 2019 email dispirited him so much that he did not think it was appropriate for him to return to work.

23. It is difficult to understand how his case can succeed, even on his version of events. He did not return to work on 1 February 2019. He did not seek to challenge the assertion in the 1 February 2019 email (which, if a little formal in tone, was not unreasonable in the circumstances) that he had resigned until over two months later, in his 16 April 2019 email. He did not return the following week to work, or at all. If (on his case) he had not been actually dismissed, it is hard to see how, by his actions and/or by his words, he cannot be taken (on his account) to have done anything but resigned.

24. In fact, I find that the version of events given by Mr Brunt and Mr Offord is probably more accurate. The claimant did indeed appear by his words and actions to have resigned. He was given the opportunity to explain in response to the 1 and 8 February 2019 emails that he had not in fact done so (or that, on reflection, did not intend to do so). But, sadly, he did not take up that opportunity. He did not come back to work (though he may have retuned, as Mr Burnt suggested, to pick up tools etc.).

25. As I have said, the claimant did not suggest that he resigned in circumstances amounting to a constructive dismissal. However, for the sake

of completeness, I find that if such suggestion had been made it would not have been persuasive. Mr Brunt's response to the claimant on 1 February, whilst perhaps a little blunt, was not unreasonable in the circumstances. It - and/or the 1 February email- certainly did not amount to a basis for bringing a constructive dismissal claim.

26. I therefore consider the claimant simply chose to resign. He was not dismissed ('actually' or constructively). The unfair dismissal claim must fail.

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9th September 2020

Employment Judge Michell, Bury St Edmunds

JUDGMENT SENT TO THE PARTIES ON
13th October 2020
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FOR THE SECRETARY TO THE TRIBUNALS