EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Pendino	**v**	BDS Audio Visual Limited

Heard at: Cambridge (by CVP) **On:** 14 & 15 January 2021

Before: Employment Judge Bloom

Appearances
For the Claimant: Mr L Varnam (Counsel).
For the Respondent: Mr B Frew (Counsel).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

The Claimant was unfairly dismissed by the Respondent. The Claimant is awarded the total sum of £9,947.43 to be paid to him by the Respondent.

REASONS

1. In this case the Claimant was represented by Mr Varnam of Counsel and the Respondent by Mr Frew of Counsel. I heard evidence from the Claimant and two witnesses on behalf of the Respondent, namely Mr Richard Farburn and Mrs Adele Morton. They are both directors of the Respondent Company and shareholders in it. In reaching my judgment I have also considered the content of a Joint Bundle of Documents consisting of some 45 pages.

2. The first issue to be determined in this case is whether or not the Claimant was dismissed. The Claimant brings a Claim of Unfair Dismissal and in order to do so he must first show that he had been dismissed within the meaning of Section 95 Employment Rights Act 1996, namely that his contract of employment was terminated by the Respondent, his employer, with or without notice.

3. In this case the Respondent denies that the Claimant was dismissed. They say he voluntarily submitted his resignation. The burden of proof falls on the Claimant to show that there was a dismissal. In consideration of this issue I remind myself that the burden of proof is on the balance of probabilities, i.e. was it more likely than not that the Claimant's contract was terminated by dismissal rather than, as the Respondent states, resignation.

4. This case involves an examination of the facts and two contrasting versions, in places, put to the Tribunal by the Claimant and the Respondent. It involves careful consideration of what amounts to ambiguous words used in conversations between the parties, particularly during the course of a conversation between the Claimant and Mr Farburn on 28th March 2019. The test of whether ostensibly ambiguous words amount to a dismissal is an objective one. I must consider all the surrounding circumstances and if words remain ambiguous I must ask myself how a reasonable employer or employee would have understood them in the light of those circumstances.

5. Having considered the evidence and on the balance of probabilities I come to the following findings of fact.

6. The Claimant was a longstanding employee having began his employment as a TV Field Engineer with the Respondent back in 1999. There had been some issues regarding his conduct back in 2005 and 2008 but none are relevant for the issues to be determined by me in this Hearing.

7. In July 2017 the Claimant was involved in a road traffic accident driving a company van. The Claimant informed the Respondent and its insurers that the other driver was at fault. Litigation in the Civil Courts ensued which was to culminate in a trial to be heard on 21st February 2019. On 12th February 2019 the Claimant informed Mr Farburn that he had lied about the circumstances surrounding the accident and in fact he was to blame for it. The Respondent's insurers were advised and the litigation was, as a consequence, settled. This fact undoubtedly would have an effect on the Respondent's future insurance provision. In this conversation the Claimant said he was sorry and offered his resignation. He said to Mr Farburn "if you want me to resign I will offer my resignation". Mr Farburn however did not accept the Claimant's offer. Mr Farburn in evidence accepted that no further conversation about the matter took place until 28th March 2019 some six weeks later. In the meantime the Claimant continued to carry out his duties and his employment continued. As Mr Farburn himself stated in his witness statement "I had no further

conversation with Matt (the Claimant) about the accident. Once the claim was settled that was the end of this matter".

8. On 21st March 2019 Mrs Morton sent an e-mail to the Respondent's employment law advisers. She asked whether the Claimant could be required to pay for the damage to the company van arising from the accident in 2017. Additionally and importantly she asked, "can I accept his resignation with immediate effect?". This is notwithstanding the fact that Mr Farburn had regarded the matter as finished. This enquiry in my judgment shows that the Respondent was giving further thought to the Claimant's future continuation of employment. It appears that no response to that enquiry was received prior to the events of the 28th March 2019.

9. On the morning of 28th March 2019 the Claimant was working in the Respondent's workshop, his company van was in for a service. Working on another bench nearby was Mr Farburn. The Claimant and Mr Farburn engaged in conversation. The Claimant asked Mr Farburn what had been the outcome of the insurance claim. Mr Farburn showed the Claimant an e-mail which showed what the cost of the claim had been. Mr Farburn made it clear to the Claimant that he was not seeking reimbursement of the amount concerned. The Claimant then said, "I'm sorry about what happened I cannot apologise enough, if you still want me to resign I will resign". In my judgment such words do not constitute an unambiguous or unequivocal notice of resignation. They, to the contrary, involve a question to Mr Farburn, namely did the Respondent wish the Claimant to resign. Mr Farburn invited the Claimant into his office and the discussion continued. Mr Farburn said to the Claimant "some weeks ago you offered your resignation, I accept it". The Claimant asked if that meant his employment was now terminated with immediate effect and Mr Farburn replied that it was.

10. The Claimant appears to have been distressed. He left the premises for about one hour to make enquiries about getting a lift home and went to a local café for a coffee. He returned and handed in his fuel card and company mobile phone. He asked about collecting his tools and was told that he could do so. On the way out he saw Mrs Morton. He had tears in his eyes, he was clearly very distressed. I do not accept that the Claimant asked Mrs Morton whether he should submit a formal resignation letter.

11. On Saturday 30th March 2019 Mr Farburn rang the Claimant. It is clear to me that the purpose of the call was not just to enquire as to the Claimants' wellbeing but also Mr Farburn was to invite the Claimant to attend a further meeting at a local public house on Monday 1st April 2019. Mr Farburn said he wanted to "work things out" with the Claimant. In my judgment at the very least Mr Farburn was clearly displaying some confusion as to what had occurred during the meeting with the Claimant on 28th March 2019. The Claimant did agree to meet with Mr Farburn. After that call he took legal advice from his solicitor and subsequently sent a message to Mr Farburn declining to attend the meeting.

12. The Respondent wrote to the Claimant on 30th March 2019 asking him to confirm his resignation in writing. He did not do so and in fact on his instructions his solicitors wrote to the Respondent on 4th April 2019 making it clear that he regarded himself as being dismissed by the Respondent on 28th March 2019. The Respondent wrote back on the 9th April 2019 denying that the Claimant had been dismissed.

13. In my judgment the words used by the Claimant on 28th March 2019 and the conversation that he had with Mr Farburn on that date did not contain a clear and unambiguous decision by him to resign his employment. He asked a question of Mr Farburn if he wanted him to resign. It was an enquiry not a resignation. Mr Farburn himself accepted in evidence that at no time on 28th March 2019 did the Claimant say anything like "I quit, I resign or I'm leaving". Mr Farburn accepted that the Claimant did not unequivocably resign that day. Mr Farburn went back to the conversation on 12th February 2019 during that discussion with the Claimant when he asked him if he wanted him to resign and purported some six weeks later to accept the offer. The Respondent did not accept the offer at the time, i.e. on 12th February 2019 and it is clear that the Claimant had in any event withdrawn any intention to resign by continuing to carry out his duties for another six weeks. In my judgment there was no resignation of his employment by the Claimant on 28th March 2019 or indeed on any other day. He was dismissed that day by the Respondent. The words and actions of the Claimant that day, who was clearly upset and distressed, were obviously ambiguous. He did not confirm his resignation in writing. To the contrary his solicitors on his behalf informed the Respondent that he had not resigned. He regarded himself as being dismissed. A reasonable employer in my judgment, taking all the circumstances into account, would not have concluded that the Claimant had resigned. Further, the Respondent had sought clarification on whether the Claimant had in fact resigned by both inviting him to a meeting on 1st April 2019 and writing to him on 30th March 2019. I have taken judicial note of the Employment Appeal Tribunal authority in Goodwill Incorporated (Glasgow) Limited v Ferrier EAT 157/89 where it was held that a similar enquiry showed that the employer did not believe the employee's ambiguous words amounted to a resignation. Such an enquiry and a request to meet with the Claimant in my judgment flies in the face of the Respondent's assertion that the Claimant had unequivocably resigned on 28th March 2019.

14. As a consequence, in my judgment the Claimant did not resign on 28th March 2019 or on any other date. He was dismissed by the Respondent effective from 28th March 2019.

15. Having determined that the Claimant was dismissed by the Respondent I must now turn to the Claims of Unfair Dismissal and Wrongful Dismissal. In this regard I heard helpful Submissions from both Mr Frew and Mr Varnam. I have taken into account those Submissions in reaching my Judgment. I have also considered the content of a Remedy Bundle and an up to date Schedule of Loss. Issues such as the Claimant's age at the

date of his dismissal, his length of service and his gross and weekly net pay are not contested.

16. With regard to the Unfair Dismissal Claim, it is for the Respondent to show that the dismissal was for a potentially fair reason pursuant to the provisions of Section 98 Employment Rights Act 1996. The Respondent primarily relies upon Section 98(1)(b) namely that the reason or principal reason for the Claimant's dismissal was for Some Other Substantial Reason namely an irretrievable breakdown in trust. As a fallback position Mr Frew submits that the reason or principal reason related to the Claimant's conduct which is also a potentially fair reason for dismissal. The Claimant clearly committed an act of gross misconduct by lying over a considerable period of time concerning his culpability with regard to the road traffic accident in 2017, an admission he made to the Respondent on 12th February 2019. Had the Respondent then invoked a fair disciplinary procedure at that time, it is more than likely in my judgment that he would have been fairly dismissed without notice at that time. However, they chose not to do so and I agree with Mr Varnam's Submission that by not doing so the Respondent affirmed the Claimant's fundamental breach of the terms and conditions of his employment, namely by reason of his dishonesty. As stated, the Claimant continued to work for an additional six week period.

17. However, as I have made clear, the Respondent was clearly giving further thought to the Claimant's continued employment on or around 21st March 2019 when they made enquiries with their employment law advisers. They had recently received information regarding the cost of the insurance claim and were understandably concerned as to whether they were able to obtain insurance in the future. On 28th March 2019 the Claimant himself did ask the Respondent if they wanted him to resign. I consider that the combination of these events, i.e. the Claimant's dishonesty up to 12th February 2019; the awareness of the cost of the insurance claim and its subsequent repercussions; and the expression from the Claimant himself as to whether his employment could continue in the future, did result in a complete loss of trust and confidence by the Respondent in the Claimant which in my judgment amounts to Some Other Substantial Reason for dismissal. The Respondent has therefore proved that there was a potentially fair reason for the Claimant's dismissal on that ground.

18. As far as issues relating to fairness pursuant to the provisions of Section 98(4) Employment Rights Act 1996 are concerned, it is obviously the case that the Respondent did not adopt a fair process and procedure on or around 28th March 2019 which was the effective date of termination of the Claimant's employment. In my judgment it is however necessary to consider the point that if a fair procedure had been adopted what impact, if any, would it have had on the outcome. The Respondent would have been able to conduct a disciplinary process compliant with the ACAS Code of Practice some two weeks after 28th March 2019. That process in my judgment would have resulted in the Claimant's dismissal on the ground of

Some Other Substantial Reason taking place some two weeks after the actual date. He would have been paid his normal salary in that two week period and the Claimant would, as conceded by Mr Frew, have been paid twelve weeks pay in lieu of his statutory notice period.

19. Mr Frew has submitted that the Basic Award and any Compensatory Award should be reduced to zero to reflect the Claimant's dishonest conduct with regard to the road traffic accident and as a consequence pursuant to the provisions of Section 122(2) Employment Rights Act 1996 it would be just and equitable not to make any Basic Award and pursuant to the provisions of Section 123(6) Employment Rights Act 1996 it would not be just and equitable to make any Compensatory Award.

20. In my judgment it is just and equitable to reduce both awards by 50%. Although the Respondent took no action against the Claimant on or around 12th February 2019 the Claimant's admitted act of dishonesty with regard to the road traffic accident in 2017 lead inextricably to the events that then occurred and this fact in my judgment should be reflected in both awards.

21. There was a failure by the Respondent to follow the ACAS Code of Practice with regard to the disciplinary process or rather lack of it and I regard that failure as unreasonable. The Respondent did have access to employment law advisers and took no steps to ensure compliance with the Code. I conclude an uplift on the Compensatory Award is just and equitable in all the circumstances at 15%.

22. The reason for the Claimant's dismissal namely Some Other Substantial Reason does not constitute an act of gross misconduct and, as conceded by the Respondent, the Claimant's dismissal should have been on twelve weeks statutory notice.

23. These findings result in the following awards in the Claimant's favour payable by the Respondent.

    (1) Wrongful Dismissal – twelve weeks net pay at the sum of £283.55 per week = £3,402.60.

    (2) Basic Award – the Claimant was 66 years old at the time of his dismissal. He had been continuously employed for 19 years. His gross weekly pay was in the sum of £325.00 per week. The appropriate calculation is therefore 28.5 x £325.00 per week = £9,262.50 less a 50% contribution resulting in the sum of £4,631.25.

    (3) Compensatory Award

        a. Loss of statutory rights - £500.00

        b. Loss of two weeks net income - £567.10

        Total - £1,067.10

There is an uplift of 15% to apply to that sum of £1,067.10 resulting in the sum of £1,227.16. A 50% reduction is then applied to that figure resulting in a net Compensatory Award of £613.58.

(4) There was a failure to provide the Claimant throughout his employment with a written statement of the terms and conditions of employment. In my judgment that results in an award in favour of the Claimant for four weeks gross pay at £325.00 per week = £1,300.00.

24. The total sum therefore to be paid by the Respondent to the Claimant arising from the above awards is £9,947.43.

25. The recoupment provisions do not apply to any part of this award.

_____
Employment Judge Bloom

Date: 26 January 2021

Sent to the parties on: ...12/02/2021...

.....
For the Tribunal Office