



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102389/2019

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Held in Glasgow on 3 September 2019

Employment Judge R King

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Mr J MacKay

Claimant

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George Hanson (Building Contractors) Limited

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the respondent did not unfairly dismiss the claimant and accordingly his claim is dismissed.

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REASONS

Introduction

1. The claimant's claim is that the respondent unfairly dismissed him following an incident outside work, which resulted in the respondent receiving two complaints about his conduct. The respondent's position is that it did not dismiss the claimant and that he resigned from his employment of his own volition.

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2. The claimant gave evidence on his own behalf and the respondent led evidence from its managing director, George Hanson and its foreman, John Kernaghan. The respondent lodged a bundle of productions.

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Issues

3. In the circumstances, the issues to be determined by the tribunal are as follows:

- (i) Was the claimant dismissed or did he resign from his employment?
- 5 (ii) If he was dismissed, was the reason for dismissal a potentially fair reason in terms of section 98(2) of the Employment Rights Act 1996?
- (iii) If so, was his dismissal fair, having regard to section 98(4) of the Employment Rights Act 1996?
- 10 (iv) If the claimant was unfairly dismissed, what financial loss has he suffered in consequence of his dismissal and has he taken steps to mitigate his loss?

Findings in fact

The Tribunal finds the following facts to be admitted or proved -

- 4. The respondent is a Rothesay based building contractor, specialising in
15 general building services within the public, commercial and domestic marketplace on the Isle of Bute. It employs approximately 29 staff.
- 5. The respondent employed the claimant as a painter and decorator from 15
July 2013 until 30 November 2018. Prior to his dismissal, his net weekly pay was £369.69 per week and in addition the respondent paid minimum
20 contributions on his behalf to the Construction Industry Pension Scheme.

The events of 27 October 2018

- 6. On 27 October 2018, the claimant went with John Kernaghan and two other
friends on a day out to Glasgow to celebrate the claimant's birthday. After
visiting one bar the claimant left the group at 2pm and went shopping, during
25 which time he collected a new jacket on behalf of his wife. The claimant met up with the group again at Glasgow Central Station at 4.45pm and they boarded the 5pm train to Wemyss Bay. There were at least three other passengers in the carriage they boarded.

7. On the train home, the claimant had several bags. In one he had his wife's new jacket and in another he had two McDonalds meals and a milkshake. At some point during the journey, the claimant reached into his bag to pick up his milkshake. As he was doing so, the lid came off and the contents spilled over his wife's new jacket. Annoyed with himself, he stood up and said loudly "I can't fucking believe I put that in there!", which he followed with several further expletives. This amused the claimant's friends, although he was upset. The remainder of the train journey home was uneventful.

The events of 29 October 2018

8. On Monday 29 October 2018, George Hanson arrived for work at the respondent's premises around 7.20am. Soon after he arrived, he received a telephone call from Morag Gilles, the manager of a council run care home in Rothesay for whom the respondent provides building services. She informed him that she had been on the same train as the claimant from Glasgow to Wemyss Bay on 27 October and had been disgusted at the language she had heard him use. She made it clear that so long as the respondent was providing building services at the care home, she did not want the claimant to come anywhere near it. She advised Mr Hanson that she did not intend to take the matter further, although she had seriously considered reporting the matter to the police.

9. Shortly thereafter, Mr Kerneghan arrived in the office. Mr Hanson took him aside and asked him what had happened on Saturday on the train from Glasgow to Wemyss Bay. Mr Kerneghan told him that the claimant had 'lost it' when he had spilled milkshake on his wife's jacket. Mr Hanson asked him if the claimant had been cursing and swearing, to which he replied, "Yes he was terrible". Mr Hanson asked Mr Kerneghan to tell the claimant that he wanted to speak to him later that morning after he had supervised all the men leaving the yard to go to their jobs for the day. When he saw the claimant Mr Kerneghan told him that Mr Hanson had said he had been a 'bad boy' and wanted to see him to discuss his behaviour on the train.

10. Before Mr Hanson had spoken to the claimant, he received a further phone call, this time from Argyll and Bute Council's Clerk of Works, Alan Graham. Mr Graham's job includes overseeing the allocation of work by the council to building contractors, such as the respondent. Argyll and Bute Council is an important customer of the respondent and provides it with approximately £30,000 a year of business.
11. Mr Graham informed Mr Hanson that he had received a complaint from Mrs Gilles, the care home manager who had been on the same train carriage as the claimant on 27 October. She had told Mr Graham that, because of the claimant's behaviour, she did not want him to work at the care home ever again. Mr Graham expressed his own displeasure at receiving a complaint of this nature and told Mr Hanson that he did not want the claimant to be sent on any more council jobs. Mr Hanson felt '*gutted*' that the respondent's good name had been brought into disrepute.
12. Later that morning, Mr Hanson drove to the Eastlands Construction site where the claimant, Mr Kerneghan and a colleague Sammy Muir had gone first thing after leaving the respondent's yard. Although he was annoyed, Mr Hanson's intention was simply to speak to the claimant in order to obtain his version of the incident that had resulted in the complaints.
13. As Mr Hanson approached the claimant's vehicle, Mr Kerneghan and Mr Muir got out and took their tools and paint into a nearby building, leaving Mr Hanson and the claimant alone.
14. When Mr Hanson reached the vehicle he asked the claimant -
- "What the fuck's this about you on the train?"*
- The claimant replied -
- "It's got fuck all to do with you, you can stuff your job. I am leaving tonight. I can get a job anywhere anyway."*

Mr Hanson tried to reason with the claimant, but he continued to insist that he was leaving his employment that same day and their conversation ended on that basis.

- 5 15. When Mr Kernaghan returned to the vehicle after Mr Hanson had left, the claimant was upset and angry. He told Mr Kernaghan he was leaving his employment because of the altercation he had just had with Mr Hanson, although he did not tell Mr Kernaghan that he had been dismissed.
- 10 16. Later that day, Mr Hanson approached the claimant again with a view to discussing the incident on the train. Although the claimant was initially confrontational, repeating that he believed the incident had nothing to do with the respondent as he had been off duty, he eventually calmed down. Mr Hanson advised the claimant that the Clerk of Works' call was a serious matter for the respondent and that the council might stop giving it business unless he stopped sending the claimant to work on council contracts. He told
15 him that if the council did stop providing business he might need to pay him off "*down the line*". He explained however that in the meantime there were other contracts for other private customers that he could work on, which were sufficient to justify keeping him on.
- 20 17. Nevertheless, the claimant confirmed to Mr Hanson that he still intended to resign, but that he now wanted to work a fortnight's notice. Mr Hanson agreed that he could do so. It was Mr Hanson's impression from this conversation that the claimant already had another job lined up to go to.
- 25 18. A few days later, Mr Hanson told the claimant that even though he had resigned voluntarily he was nevertheless willing to pay him a severance payment equivalent to a redundancy payment. Mr Hanson decided to do this because he liked the claimant and not because of any sense of guilt he felt about the circumstances of his departure. He had known him for many years as a friend as well as a colleague and they played golf together. He did not want their working relationship to end on bad terms. Mr Hanson would have
30 been happy to re-employ the claimant after the dust had settled in relation to the complaint by the council and he told him so.

19. It was subsequently agreed that the claimant would work his contractual five weeks' notice and that his last day of employment would be 30 November 2018.
20. Between 29 October and 30 November 2018, the claimant saw Mr Hanson regularly and had numerous opportunities to withdraw his resignation. Had he done so, Mr Hanson would have been willing to accept his decision, forget the matter and carry on.
21. Prior to the 27 October 2018 incident, the claimant had told Mr Kernaghan that he intended to leave the respondent's employment because he had received a better offer of work with another local contractor; namely DC Murray, which is owned by Jack Xu. At that time Mr Kernaghan had sought to dissuade him from leaving. Mr Hanson was unaware of this conversation when he spoke to the claimant on 29 October 2018.

Severance pay and mitigation of loss

22. When the claimant terminated his employment, he received a final pay slip of £3,432.44, including the sum of £2,080, which was the equivalent to the redundancy payment that he would have been entitled to had he been dismissed for that reason.
23. Following the termination of the claimant's employment on 30 November 2018, he worked as a contractor on his own account until he secured full time employment on 12 February 2019 with the Ardmaleish Boatyard where he has worked since, and has a net take home pay of £350 per week.
24. Between the last date of his employment with the respondent and taking up his new position on 12 February 2019, the claimant carried out work as a self employed painter on the following dates for the following customers: -
- (i) 3 to 21 December 2018 for Jack Xu for payment of £1,025 net;
 - (ii) 16 to 17 December 2018 for Martin Gillies for which he charged £60 but was not paid;
 - (iii) 20 January 2019 for 8 days for Andrew Lamb for payment of £420 net.

Claimant's submission

25. In his submission, the claimant accepted that prior to the incident on the train on 27 October 2018, he had spoken to Mr Kerneghan about his interest in another job but that this was only natural for any employee. However, he had never genuinely intended to leave the respondent's employment to take up another job.
26. At no point had he given Mr Hanson his resignation. Mr Hanson had dismissed him with two weeks' notice because of the complaints he had received and he had no option but to accept the position.
27. Mr Hanson's agreement that he could work his contractual notice and the fact he had been paid a redundancy payment supported his position that Mr Hanson had in fact dismissed him. Mr Hanson was a businessman, who would not have paid the claimant any money if he had simply resigned, as he had claimed. The truth was that he was paying him off because he had dismissed him.

Respondent's submission

28. On the respondent's behalf, Mr Hart submitted that no dismissal had taken place and that the claimant had resigned of his own volition in order to work elsewhere.
29. Mr Hanson had received telephone calls complaining about the claimant's conduct while travelling by train on 27 October 2018 and this was a serious matter for the respondent. Mr Hanson had decided to commence an investigation and had visited the claimant on site for that purpose. However on approaching him on 29 October 2018, the claimant was defensive and dismissive of the allegations, stating that he was "*leaving anyway*". He was not prepared to enter into any discussion about the incident or to allow the respondent to carry out a proper investigation.
30. Mr Hanson had met the claimant later on 29 October and the claimant had maintained his stance that he was leaving. It was subsequently agreed that

the claimant would leave the respondent's employment on 30 November 2018.

31. No dismissal had taken place and the claimant's failure during his notice period to complain about his dismissal or to raise a grievance had been
5 consistent with that position.

32. The respondent submitted that the claimant had resigned of his own volition, in order to set up his own business, and had taken advantage of his conversation with Mr Hanson on 29 October to trigger that. His intention to set up his own business was evident from the fact he had started work for Mr Xu immediately after he left the respondent's employment.
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The relevant law

33. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances - **Sothorn v Franks Charlesly & Co 1981 IRLR 278, CA.**
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34. There are however important qualifications to that general rule. In **Sothorn**, Lord Justice Fawkes LJ thought that there might be an exception in the case of an immature employee, or a decision taken in the heat of the moment, or an employee being jostled into a decision by the employer. Dame Elizabeth Lane agreed, referring to exceptions in the case of *"idle words or words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously... [or] a case of employers anxious to be rid of an employee who seized upon her words and gave them a meaning which she did not intend."* In such cases, it may be appropriate
20 to investigate the context in which the words were spoken in order to ascertain what was really intended and understood.

35. What applies to an angry or an emotional resignation may also apply – but more rarely – to an angry dismissal. In **Martin v Yeoman Aggregates Ltd 1983 ICR 314, EAT**, the employer angrily dismissed the claimant but within
25 five minutes had realised it had been over-hasty and varied the penalty to one
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of two days suspension. The claimant however insisted that he had been dismissed and claimed unfair dismissal. The EAT held that, in the circumstances, there had been no dismissal. Mr Justice Kilner-Brown said that it was desirable, as a matter of common sense in good industrial relations, that an employer (or employee) should – in special circumstances – have the opportunity of withdrawing words spoken in the heat of the moment. If words spoken in anger were immediately withdrawn, there was no dismissal.

Discussion and decision

36. The tribunal accepted Mr Hanson's account of the events. It was satisfied that Mr Hanson's initial approach to the claimant on 29 October 2018 was made with a view to ascertaining his account of the incident on the train on 27 October 2018, about which he had received two complaints. While Mr Hanson's approach was admittedly robust in the heat of the moment, he did not use unambiguous words of dismissal and the claimant was not entitled to consider himself dismissed as a result.
37. The tribunal therefore accepts Mr Hanson's evidence and finds that the claimant resigned from his employment during his conversation with him on the morning of 29 October 2018. The tribunal concludes, on balance, that the claimant had been planning to leave the respondent's employment in any event. In that regard, it accepted Mr Kernaghan's evidence that the claimant had previously told him that he intended to leave the respondent's employment.
38. The tribunal accepted that during the early part of 29 October 2018 emotions were running high and both the claimant and Mr Hanson were upset. However, the tribunal was satisfied that when they spoke later that day, they had both calmed down and the claimant had the opportunity to withdraw his resignation. However, he did not do so and instead he remained adamant that he was leaving the respondent's employment, albeit after two weeks' notice rather than at the end of that day. The tribunal was satisfied that the claimant would have had many opportunities to withdraw his resignation

between 29 October and 30 November, and that Mr Hanson would have allowed him to do that.

39. The tribunal also accepted Mr Hanson's evidence that he had not "paid off" the claimant because he felt any legal responsibility for the termination of his employment. Rather he had paid him a severance payment because they were friends and he did not wish their working relationship to end on bad terms. The tribunal also found that Mr Hanson would have been happy to take the claimant back after the dust had settled in relation to the complaint by the council.
40. In all the circumstances, the tribunal finds that the claimant resigned from his employment on 29 October 2018 and that he was not dismissed. His unfair dismissal claim is therefore dismissed.

R King
Employment Judge

03 October 2019
Date of Judgment

Date sent to parties

07 October 2019