



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103780/2020

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Held via Cloud Video Platform (CVP) on 14 December 2020

Employment Judge F Eccles

10 **Mr D Allan**

**First Claimant
Represented by:
Mr J Gildea -
Solicitor**

15 **Mr P Dewar**

**Second Claimant
Represented by:
Mr J Gildea -
Solicitor**

20 **Office And Industrial Cleaners Ltd**

**Respondent
Represented by:
Mr J Barbour -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

REASONS

Background

1. The claims were presented as a multiple claim on 17 July 2020. The claimants complained of unfair dismissal and sought outstanding wages, including holiday pay and notice pay. The claims were resisted. In their response lodged on 18 August 2020, the respondents denied having dismissed the claimant. The respondent averred that the claimants had resigned effective from 20 May 2020. In the alternative, the reason advanced in the response for dismissal was redundancy. The claim was listed for a final hearing.

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2. At today's final hearing, the claimant was represented by Mr J Gildea, solicitor. The respondent was represented by Mr J Barbour, director and proprietor of the respondent. The tribunal heard evidence from Mr J Barbour for the

respondent. Both claimants gave evidence. The parties provided the tribunal with witness statements which was their evidence in chief. The statements were taken as read. The claimants provided the tribunal with a bundle of productions.

5 **Findings in fact**

3. The tribunal found the following material facts to be admitted or proved; the first claimant was employed by the respondent and their predecessors from 1982 until 2 June 2020. He was employed as a contract cleaner/window cleaner with supervisory responsibilities. The second claimant was employed
10 by the respondent on 4 July 2016 to 2 June 2020. The second claimant was employed as an office cleaner. The first claimant's weekly salary was £440 gross and the net take home pay of £369.45. The second claimant's salary was £272.32 per week with a net take home pay of £256.12 per week.

4. At the date of dismissal, the first claimant was aged 54. The second claimant
15 was aged 53. The respondent provides cleaning services, in particular window cleaning and office cleaning. They employ around 6 people including the claimant and one subcontractor.

5. Following the government announcement of lockdown due to the COVID
20 pandemic in March 2020, at least if not all of the respondent's clients no longer required their services. Mr Barbour of the respondent wrote to the claimants on 26 March 2020 as follows:

"I write to advise you of the effects COVID-19 has on Office & Industrial Cleaners Ltd.

*As of today we have advised that all of contracts we carry out are closed until
25 further notice.*

The end of the month is the time we get paid by our clients. I am unsure that will be the case as the payments departments of our clients are also closed.

The end of the month also is a time where we send our invoices for March, which may sit in an empty office until further notice.

The Government has indicated they will assist by the 80% on all wage payments, which is great if the company can access this system, this has not been setup so far, part of the process is for the company to pay all wages until the end of April and then reclaim it back.

5 *Office & Industrial Cleaners can only pay wages if it receives payments, at present there is not enough money in the bank account to pay wages next week, if payments from clients arrive into the account I will pay the wages.*

Looking at the worst case you may not have a wage in your bank account on the 2nd April 2020.

10 *With the above information you must take steps to ensure you have some form of income by contacting your local Government Departments.”*

6. Both claimants were successful in obtaining a temporary contract with the cleaning agency on 6 April 2020 at Wishaw General Hospital. Both claimants were paid around £300 per week during the 13 week contract. Neither of the claimants received any payment of wages from the respondent during the 13 week period.

7. On or around 19 May 2020, Mr Barbour contacted both of the claimants to enquire about their current situation. Both claimants informed Mr Barbour about the temporary contract at Wishaw General Hospital. Mr Barbour mentioned to the second claimant that one of his contracts was with Stirlings due to open soon, around 15 June 2020. Mr Barbour enquired about Mr Dewar's availability to work on the contract. The second claimant sought to reassure Mr Barbour that he would be able to work on the Stirlings contract and honour his hours with the NHS contract.

25 8. On 20 May 2020, Mr Barbour went to the first claimant's home. He asked the first claimant if he would be willing to continue working on contracts using his car. This arrangement was unacceptable to the first claimant. Mr Barbour handed the first claimant two letters in the same terms as follows:

“Hi David,

Further to our telephone conversation and our meeting today 20th May 2020 can I confirm several points.

You have taken on a 13 week contract with the NHS which has still six weeks still to run, you have also taken a full time contract working directly to the NHS, which you have accepted.

You also indicated that this will be your preferred employment position.

We have now reached a position where we both have agreed to terminate your employment with Office and Industrial Cleaners Ltd.

We enclose your P45 with any outstanding wage slips, we also advise you that your pension scheme is fully up to date.

I wish you every success in your new position and if you require any references please contact me.”

9. Mr Barbour instructed the first claimant to hand a copy of the letter to the second claimant. Neither claimant was paid notice pay. Neither claimant wished to terminate their employment with the respondent. The respondent ceased trading on 1 November 2020.

Discussion and deliberations

10. The claimants have the right not to be unfairly dismissed in terms of section 94 of the Employment Rights Act 1996. In terms of section 98 of the Employment Rights Act 1996, it was for the respondent to show the reason or if more than one the principle reason for the claimant's dismissal and that it was either a potentially fair reason within the meaning of section 98 (2) of the Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

11. At the start of the hearing, Mr Barbour for the respondents stated that the respondent had dismissed the claimants. This was not as previously stated in the ET3. In any event, the tribunal was satisfied from the evidence before it that the claimants had been dismissed by the respondent. The tribunal did not accept that in all the circumstances, the claimants had said or acted in

such a way to entitle the respondent to conclude that they had terminated their employment. Mr Barbour accepted that the second claimant had not entered into any communication with him to suggest that this was the case.

12. The tribunal therefore had to consider what was the reason for the claimant's dismissal. The tribunal was not satisfied that the respondent had established that there was a potentially fair reason for the claimant's dismissal. The claimants had been advised by the respondent to seek alternative employment during the COVID lockdown. Neither the claimants on the evidence before the tribunal refused to return to work for the respondent. The tribunal did not accept the first claimant was obliged to use his own car to undertake work and there was no evidence to support any suggestion that the second claimant had indicated to the respondent that he did not wish to return to their employment once work became available.

13. The tribunal considered whether the respondent had established the potentially fair reason of redundancy and/or some other substantial reason. For the reasons given above, the tribunal was not satisfied that a potentially fair reason had been established by the respondent.

14. It was therefore thought necessary for the tribunal to go on to consider whether the respondents in terms of section 98 (4) had acted reasonably or unreasonably treating the potentially fair reason as a sufficient reason for dismissing the employee. In the event the tribunal is wrong and that this is a potentially fair reason has been established by the respondent, the tribunal was not satisfied that the respondents did act reasonably in the procedure that they followed regarding the dismissal of the claimants.

15. No notice was given to the claimants as regards the possibility of their dismissal. Nothing was set out by the respondents as to how the claimants could have avoided dismissal. As there was evidence of a downturn in work as a result of the COVID pandemic, it was the respondent's position before the tribunal that work was now available for the claimants to do, at least for part of their contracts. There was no right of appeal. The respondents failed to follow the ACAS procedure.

16. In all the circumstances therefore, the claimant's dismissal was unfair.
17. As regards awards, both claimants sought a compensatory award. The tribunal was satisfied that both claimants were entitled to a basic award. Least upon, the effective date of terminate of 2 June 2020, age at date of dismissal (54), number of years service (37 years) and gross weekly pay of £440, the claimant is entitled to a basic award of £11,660 (26.5 weeks x £440).
18. The claimant is also entitled to a period of notice which based upon his length of service amounts to £4,433.40 (12 weeks x £369.45). Thereafter, the claimant is entitled to loss of wages to 1 November 2020 when the tribunal was satisfied that the claimant's employment would have terminated in any event due to the respondents ceasing to trade. The claimant is also entitled to an uplift for failure to comply with the ACAS procedure and compensation for loss of statutory rights of £500. The claimant is also entitled to holiday pay of 4 days, which had accrued from the start of the holiday year in April 2020 to the effective date of termination of 2 June 2020 amounting to £352.
19. As regards the second claimant, he was entitled to a basic award of £1,225.44 based upon the date of termination of 2 June 2020, age at date of dismissal (53), number of years of service (3) and statutory week's pay of £272.32. The claimant is also entitled to notice pay totalling £768.36 (3 weeks x £256.12). The claimant is also entitled to holiday pay of four days amounting to £204.89 and loss of statutory rights of £500. The claimant is also entitled to loss of earnings to 1 November 2020 when the tribunal was satisfied that the respondents ceased to trade and the claimant would therefore have been dismissed in any event. The claimant is entitled to an uplift on the above sum for failure to follow the ACAS code.
20. The tribunal preferred the evidence of the claimants which on balance it found to be more credible than that of the respondent, Mr Barbour. Mr Barbour's position was inconsistent. In his ET1, he accepted that the claimants were entitled to payments in the period of their employment to 20 May 2020. This was not an unreasonable position and there were no reasons for any deduction from their wages during the course of their employment. Mr

Barbour did not satisfy the tribunal that there were adequate reasons for dismissing the claimants. The tribunal did not accept that either claimant had indicated to Mr Barbour grounds upon which it was reasonable for him to conclude that they wished to terminate their employment.

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Employment Judge: Frances Eccles
Date of Judgment: 29 January 2021
Entered in register: 02 February 2021
and copied to parties

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