EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109891/2021

Final Hearing Held by Cloud Video Platform on 20, 21 and 22 September 2021

Employment Judge Russell Bradley

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Mr Gary McIntyre	**Claimant** **Represented by:** **Ms T McIntyre,** **Claimant's sister**
Brady's Craft Butchers Limited	**Respondent** **Represented by:** **Ms. D Benham,** **Office Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

1. The claimant was not continuously employed by the respondent for a period of not less than two years ending with his effective date of termination as is required by section 108 of the Employment Rights Act 1996 in order to make 30 a claim of unfair dismissal. The Tribunal has no jurisdiction to determine this claim which is therefore dismissed.

2. The claimant was not continuously employed by the respondent for a period of not less than two years ending with his effective date of termination (the relevant date) as is required by section 155 of the Employment Rights Act

1996 in order to make a claim for a statutory redundancy payment. The Tribunal has no jurisdiction to determine this claim which is therefore dismissed.

3. The claim for damages for breach of contract succeeds; the respondent shall pay damages to the claimant of the sum of ONE THOUSAND FOUR HUNDRED AND SIXTY EIGHT POUNDS (£1468.00).

REASONS

Introduction

1. With an email sent on 2 August 2021 parties received notice of this final hearing. In an ET1 presented on 9 June 2021 the claimant made claims of unfair dismissal, for a statutory redundancy payment and for notice pay. The claims were resisted. It was agreed that the correct designation of the respondent is Brady's Craft Butchers Limited. Ms McIntyre agreed that there was no claim of discrimination (contrast the indication in box 9.1 of the ET1).

2. Notwithstanding the terms of a case management order dated 20 July which contained standard orders for the exchange and production of a hearing bundle, neither party had prepared one. It was clear from the ET1 and ET3 that an amount of paperwork was relevant for this hearing. I adjourned the hearing at 11.00am for two hours with a direction that parties co-operate, lodge and have available for witnesses an indexed and paginated bundle. On resuming the hearing at 1.00pm the respondent had prepared an indexed bundle of 29 pages. I was also asked to consider a separate document which contained six emails of which five were contemporaneous to the then ongoing dispute between the parties. They spanned the period 28 to 30 April 2021. In the course of evidence and with the respondent's agreement the claimant lodged a screenshot of three text messages which had been sent on 2 March 2021 by him to the respondent's director and which were relevant to the issues. It had become apparent only in the course of the evidence that the exchange had occurred and that they were relevant.

3. In discussions with Ms McIntyre prior to hearing evidence, she accepted that; there was a dispute as to the start date of the claimant; his assertion as to his start date was dependent on establishing that his employment with a previous employer, Smith Direct Butchers, had transferred to the respondent by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE); that assertion was disputed; he had no evidence to support a finding that TUPE applied and that he transferred by virtue of them. That being so, she accepted that he was not able to establish sufficient service so as to maintain claims of unfair dismissal and for a statutory redundancy payment. The Tribunal has no jurisdiction to hear those claims in those circumstances. They are therefore dismissed.

4. The remaining claim was for notice pay, or more accurately for damages for breach of contract those damages representing what the claimant would have received if he had been dismissed by the respondent, and with it honouring a contractual period of one month. Parties were agreed that in terms of an unsigned written contract (which became **pages 1 to 13** of the bundle) the notice to which he was entitled was one month. Helpfully parties agreed that the claimant's net pay for that period would have been £1468.00. It was agreed that if the claim succeeded this was the measure of damages and thus of any award. What was in dispute was whether the claimant had resigned or whether he had been dismissed (with immediate effect) by the respondent.

The issues

5. Reflecting the purpose of the hearing, and the relevant legislation, the issues for this hearing were:-

   a. Did the claimant resign on 2 March?

   b. If not did the respondent dismiss the claimant with immediate effect on 3 March in breach of contract?

   c. If so, what damages are due to the claimant in respect of that breach?

The evidence

6. I heard evidence from the claimant, his sister and representative Tracey McIntyre, Daniel Cuthbertson, Ms Benham, Karen Brady the respondent's director and Marlene Brady Rogon, employee of the respondent. Mr Cuthbertson had originally been listed by the respondent on its date listing stencil. He had since left the respondent's employment. Ms McIntyre indicated her intention to call him for the claimant. By agreement with the respondent his evidence came out of turn and last (on day three) because he was not available earlier.

Findings in fact

7. I found the following facts admitted or proved.

8. The claimant is Gary McIntyre.

9. In terms of a written but unsigned contract between the parties the claimant was employed by the respondent as a delivery driver. In terms of that contract, his employment began on 2 October 2020. His continuous service also began on that date. As set out in it, his normal working hours were 37.5 per week.

10. The respondent is a limited company. It was incorporated on 2 October 2020. It trades from premises at Belgrave Street, Bellshill Industrial Estate, Bellshill. It trades as a wholesale butcher. It supplies its products to care homes, restaurants, butchers shops and to the homes of retail customers. Its director is Karen Brady. Diane Benham is employed as Office Manager. At the time of the dispute between the parties the respondent employed about ten staff. Three of them were delivery drivers. After the departure of the claimant that number reduced to two. One of those other drivers was Daniel Cuthbertson. Mr Cuthbertson was employed between October 2020 and 27 August 2021. While he was employed as a delivery driver, Mr Cuthbertson supervised the work of the claimant.

11. For a period of time prior to Christmas 2020, the claimant did work at former bank premises in Airdrie. He had been asked to do so by Paul Gregory, a business associate of Ms Brady. Ms Brady and Mr Gregory are co-directors

in One Recruitment (Glasgow) Ltd. That work included general labouring, scaffolding and cleaning. Mr Cuthbertson also did similar work at those premises having been asked to do so by Ms Brady. By the end of his time doing that work, the claimant was unhappy at having been asked to do it. He considered himself to have been employed as a delivery driver. This was work which was outside what he saw as his duties. His perception was that after Ms Benham became aware of his unhappiness at being asked to do that work his "*coat was on a shaky peg*".

12. Mr Cuthbertson was furloughed for the month of January 2021. The claimant was furloughed in February. He returned to work on Monday 1 March. He returned to his duties as a delivery driver. His perception that day was that Ms Benham was not as friendly as other colleagues were. There was no conversation between them. He believed that her reaction to him was because he had been unhappy about doing non-driving work in Airdrie.

13. For the performance of his duties, the claimant was permitted to take home a van belonging to the respondent at the end of a working day.

14. The bundle index showed page 6 as being "*Velocity Fuels Tracker*" for the claimant's vehicle. That page showed the movements of the claimant's vehicle on Tuesday 2 March. It recorded 11 trips spanning the period between 09.14 and 15.19 that day. It showed the start of the first trip and the end of the last trip as being 577 Old Edinburgh Road, Uddingston, G71 6HJ. That address is in close proximity to the claimant's home address. It showed that the claimant arrived at the respondent's premises at 09.19.

15. Trip 7 as shown on page 6 was between 12.26 and 12.54. In that time the claimant travelled from W Lodge Road, Renfrew to 11 Well Street Paisley. The page shows the claimant's vehicle making one other stop in Paisley at 18 New Street at 13.14. He appears to have been there between 13.14 and 13.22. He then travelled between that time and 14.15 to Burnfield Drive Glasgow.

16. The claimant's recollection was that he was in the Paisley area on 2 March. He could not recall the addresses in Paisley where he had stopped to make deliveries. He recalled that one of them was up a tenement close. He recalled it because of its unpleasant smell.

17. At about 13.30 or 13.45 a customer in Paisley telephoned the respondent. The customer spoke to Marlene Brady Rogon, the respondent's telesales advisor. She shares an office with Ms Benham. Ms Brady Rogon made a typed note of the conversation and the conversations that followed. She did so the next morning, 3 March. She took notes at the time, on 2 March. The typed note was prepared on 3 March. She did so because some time in the afternoon of 2 March, Ms Benham asked her to do so. The typed note was produced.

18. The note recorded; the customer reference number and the fact that he had a PA post code; the reason for his call, being to ask when his order would be delivered; his reason for asking, being he needed to go out for an "*electricity top up*"; the fact that Ms Brady Rogon told him she would need to get back to him once she had checked with the driver.

19. The note then recorded that; Ms Brady Rogon asked Ms Benham who was on the run; she was told it was the claimant; and she called him for an update.

20. The note then recorded that the claimant said he had already been and the customer was not in. It continued that Ms Brady Rogon; explained to the claimant that the customer had not been out; he was awaiting the delivery and needed a time for it as he was "*desperate*" to get his electric top up. It continued that the claimant said that; he was on the phone to Danny [Cuthbertson]; "*so to ask him ???*", Ms Brady Rogon said "*well can you go back then*" and the claimant said that he would not do so. The note recorded that she then asked him when the customer would get his delivery to which the claimant replied that he would get it the next day, 3 March. The note then recorded that; she said ok; she then spoke to Ms Benham; her advice was to call the claimant back to tell him to deliver the goods as the respondent did not go that way on a Wednesday. The note went on that she called the

claimant back. It implies that she relayed Ms Benham's instruction to deliver the goods that day, 2 March. The note then recorded that the claimant went on to say "*You tell Diane I am not taking it back and she can shove the van up her arse and I'm bringing the van back and she can have the keys I am sick of this I mean I didn't get to my first delivery till 11.45 it's a joke!*"

21. The various conversations recorded in the note had ended by about 14.15. By that time, the claimant had travelled to Burnfield Drive, Glasgow. He left there at 14.20. The Tracker recorded his journey from there to Barbae Place, Bothwell. It showed his arrival there at 15.04. He left by 15.07 and travelled to the last stop of the day at 577 Old Edinburgh Road, Uddingston by 15.19. The claimant did not return to the respondent's premises on 2 March. He did not return to the respondent the goods which were to be delivered to the customer in Paisley.

22. At 18.03 on 2 March, the claimant sent a text to Ms Benham. It said, "*Just to let you know I'll be at work tomorrow. If you want rid of me you will have to sack me or pay me off. I'm not walking out.*" Ms Benham did not reply to the text.

23. Also at 18.03 on 2 March the claimant sent a text to Ms Brady. It said, "*I know Diane had probably called you about today. Just to let you know I will be at work tomorrow. If you want rid of me you will have to pay me off or sack me. I'm not walking out.*" Ms Brady replied. She said, "*Hi Gary just go this haven't spoken to Diane or anyone about your message so this is all first I'm hearing of it I'll speak to Diane in the morning about this and I'm hoping to try and get in to office for an hour or so if I can get about and physically get in I'll catch up with what's been happening/said then look at it from there. Don't know anything about being sacked But will look at tomorrow ok*". The reference to trying to get in referred to the fact that Ms Brady had sustained an injury and was not attending the premises every day at that time. The claimant replied at 19.02 saying, "*Ok see you tomorrow.*"

24. The claimant attended work at the respondent's premises on Wednesday 3 March. He was engaged in routine work which included loading goods onto

vans. Ms Benham invited him to a meeting with her alone which he attended. In the course of that conversation, Ms Benham told the claimant that the respondent would accept his resignation with immediate effect. The claimant said that he was not leaving and that the respondent would need to sack him. Ms Benham suggested that it was clear to her that he was unhappy in the respondent's employment. She asked him if he had delivered the parcel to the customer in Paisley. He said that he had not done so and had brought it back. Ms Benham noted that he had not told anyone that he had done so. She said that he had failed to deliver it. The claimant suggested to Ms Benham that she had a vendetta against him. She denied it. She told him that she wanted an explanation as to why the delivery in Paisley had not been done the previous day. The claimant accused her of lying. He accused Mrs Brady Rogon of lying. The meeting ended with nothing material being resolved.

25. A short time thereafter, Ms Benham invited the claimant back for a further meeting. On this occasion she also invited Mr Cuthbertson to be present. Mr Cuthbertson agreed. She began the meeting by explaining why she had asked Mr Cuthbertson to be present. She said that the claimant had told her that he had returned the box and that he should not have done that. Mr Cuthbertson's impression was that Ms Benham was intending to dismiss the claimant. He said words to the effect that she could not sack him for not delivering a box to a customer as "*we've all done that*." Ms Benham then said that he was being made redundant with immediate effect. She told him to leave, which he did. As the claimant had driven the respondent's van to its premises that morning, Mr Cuthbertson drove him home.

26. Ms Benham typed and signed a statement dated 3 March. She did so because Ms Brady asked her to do so.

27. Somewhere between 16.00 and 17.00 on 3 March, the claimant contacted his sister, Tracey McIntyre. She is a business director of a recruitment company. That day and after discussing matters with the claimant, Ms McIntyre called Ms Brady. It was agreed in that conversation that Ms Brady would require to investigate matters. They agreed that she would contact the claimant within

two or three days after that investigation. Notwithstanding that agreement the respondent issued a letter to the claimant that day. Amongst other things the letter said, "*As per our discussion on Wednesday 3rd March we are writing to confirm acceptance of your resignation which you requested as to be with immediate effect on Tuesday 2nd March 2021 and the returning of the van and keys.*" The claimant received it on Friday 5 March.

28. On her brother's behalf, Ms McIntyre attended the respondent's premises on 5 March. She met with Ms Benham. In the course of that discussion Ms Benham said that she had made the claimant redundant. She explained that she had done so as she was trying to ensure that he would get more money.

29. On 21 April the claimant raised a grievance. Early conciliation began on 29 April. On 14 May Ms Brady replied to the grievance. ACAS issued a certificate on 18 May.

Comment on the evidence

30. There was a considerable amount of dispute about the content of a number of conversations which took place on Tuesday and Wednesday 2 and 3 March. The evidence from the witnesses who were party to them was incomplete. Some witnesses contradicted others on aspects of that evidence. Where there was conflict on material issues I preferred the evidence of Mrs Brady Rogon or of Mr Cuthbertson to that of the claimant and/or Ms Benham. I did so because neither of Mrs Brady Rogon nor Mr Cuthbertson had an interest to promote in what they said. The claimant clearly was not impartial and for reasons which I note below did not on the whole give evidence which was persuasive. Ms Benham was representing the respondent in the position which it had adopted. She was maintaining a position in which she herself had an interest. Separately in some aspects her evidence was unsatisfactory. I note them below.

31. The claimant was not a convincing witness. He could not recall any detail of his journeys on 2 March, even with the benefit of the Tracker evidence. He could not recall the address of the customer in Paisley, even though the

Tracker evidence would have provided some information as to its location. He could not explain why the Tracker appeared to show him returning to his home at about 15.19 even though he was scheduled to work 37.5 hours per week. More significantly, he maintained that he had returned the box to the respondent's premises that day even though the Tracker evidence does not record any return visit. While it was accepted by him that in his last conversation with Mrs Brady Rogon he said, "*I'm sick of this, I've had enough of this*" he denied her version of it. He could not explain why he was unwilling to return to Paisley from Burnfield Drive Glasgow to deliver the goods to the customer there, even though to have done so would have been within his normal working hours. Separately, on occasions he was prompted by Ms McIntyre as to what his evidence was in answer to questions, which suggested that he himself was unsure about the answer.

32. Ms McIntryre's evidence was not central to the facts in dispute. She had been representing the claimant, her brother, in the immediate aftermath of the ending of his employment. She personally attended the respondent's premises on 5 March by which time the overall relationship had become strained. She clearly wanted to promote her brother's best interests. To that extent she could not be and was not an independent and impartial witness to fact.

33. Mr Cuthbertson's evidence was both credible and reliable. He accepted that his recollection of the whole conversation on 3 March was incomplete. This was understandable given the passage of time. He was by the time of the hearing no longer employed by the respondent. It was not suggested that he was friends with the claimant or had been at any time. Nor was it suggested that he had any motive or interest to be anything other than honest.

34. Ms Brady's evidence was not central to the facts in dispute. She accepted that her position by the end of the call with Ms McIntyre on 3 March was inconsistent with the terms of the letter issued to the claimant that day. She candidly accepted that by the end of the call, she "*just wanted Ms McIntyre off the phone*". That candour was to her credit. Having said that, she had a

tendency to talk over some questions and to speak very quickly. My impression was that she was defensive of the respondent's position. On several occasions in her evidence she accepted that with hindsight she would have done things differently which was again to her credit.

5 35. Ms Benham's evidence was in some respects unsatisfactory. She could not explain why she made no mention of the claimant's text on 2 March to her either in her statement dated 3 March or in the ET3 which she completed. Similarly, in the ET3 she noted when referring to the meeting on 3 March with the claimant and Mr Cuthbertson, "*Gary was speaking over me & being* 10 *aggressive again in the way he was speaking to me, which caused me to blurt out that we would make him redundant as the situation was getting heated.*" Several points occur. First, there is no mention in her statement of 3 March that she blurted out anything about a redundancy. Second, the ET3 version is not consistent with Mr Cuthbertson's recollection of how she dismissed the 15 claimant. Third, Mr Cuthbertson did not corroborate the suggestion that the claimant was being aggressive in the meeting. She accepted, however, that in her first meeting with the claimant on 3 March that she "*would accept*" his resignation. This suggested that at that point in time she did not consider that he had done so.

20 36. Mr Brady Rogon was a credible witness. She gave unchallenged evidence that she had about 20 years' management experience. She was clear on what the claimant had said to her on 2 March. She could recall the time of the first call by reference to when she had finished her lunch. She was clear on when the following calls occurred. She was also clear that she had noted it at the 25 time. There was no suggestion that she had any motive to "*make up*" any part of her conversations with the claimant that day. Her indignation at the suggestion appeared to be genuine.

Submissions

37. Ms McIntyre made an oral submission. She highlighted the claimant's 30 concerns about how precarious was his job after returning from furlough. She challenged Ms Benham's evidence and particularly her credibility on her

rationale for having made him redundant. She questioned Ms Brady's real intentions on her suggestion of an investigation when in reality the respondent had written a letter accepting the claimant's resignation.

38. Ms Benham's short submission was to the effect that the claimant had walked out of his job on 2 March after the request and instruction to him that he return to make the delivery to the customer in Paisley. He had resigned in saying as he did to Ms Brady Rogon.

The law

39. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment*." The remaining claim is relevantly and timeously made under Article 3.

40. I have referred to two reports in previously decided cases below. I do not rehearse them here.

Discussion and decision

41. The only real question in this case is; did the claimant resign on 2 March? If that question is answered in the affirmative the claim fails. That is because if I find that he did resign, then that resignation was without notice. Thus the effective date of termination was 2 March. That being so, he is not entitled to be paid in lieu of any notice period. If the question is answered in the negative, the claim succeeds. That is because if he did not resign, he was dismissed

by Ms Benham in the meeting with the claimant (and Mr Cuthbertson) on 3 March. There is no dispute that in that meeting she said that he was being made redundant with immediate effect. Looked at another way, the respondent's case is that those words do not matter because by that time (and indeed on the day before) the claimant had brought the contract to an end by the words that he used in his last conversation with Mrs Brady Rogon.

42. I had regard to decisions of the Court of Appeal in two cases. First, ***Sothern v Franks Charlesly & Co*** (1981) IRLR 278. Second, ***Sovereign House Security Services Ltd v Savage*** (1989) IRLR 115.

43. In ***Sothern***, the relevant facts were that the claimant was the office manager of a firm of solicitors. During 1978, the relationship between Mrs Sothern and the firm's senior partner deteriorated. On 6 November 1978, there was a meeting between Mrs Sothern and Mr Franks. Later that day there was a partners' meeting of the firm, which Mrs Sothern attended as partnership secretary. At the end of that meeting, Mrs Sothern said she had something to say. The Industrial Tribunal found that she said "*I am resigning*", and that she was then thanked for her services. Mrs Sothern returned to the office the next day. She then took the view that she was staying on and that if the firm wanted her to leave, they would have to dismiss her. Eventually, she was told that she was regarded as having resigned at the partners' meeting and that her resignation had been then accepted. The industrial Tribunal decided that her words were ambiguous and she had not resigned. The Court of Appeal disagreed. The general principle set out by the Court in ***Sothern*** is that when the words used are unambiguous and so understood, what a reasonable person would have understood in the circumstances is not relevant.

44. In ***Savage*** the claimant was employed as a security officer. Following the discovery that money was missing from the company, he was telephoned by the head security officer and told that he was being suspended forthwith pending police investigations. He responded by saying, "*I am not having any of that, you can stuff it, I am not taking the rap for that*". He then telephoned his immediate superior and told him that he would not be in to relieve him the

following morning as arranged. According to his superior, Mr Savage agreed that he was "*jacking the job in*" and asked him to inform the duty inspector of the situation. The employers treated Mr Savage as having resigned. Mr Savage subsequently made a complaint of unfair dismissal which was upheld by the Industrial Tribunal. The Tribunal rejected the employers' argument that he had not been dismissed but had resigned. The EAT dismissed an appeal against that decision. The Court of Appeal dismissed the appeal. In it Lord Justice May said, "*In my opinion, generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view Tribunals should not be astute to find otherwise. However, in some cases there may be something in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or herself, to entitle the Tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight*."

45. In this case the question becomes; were the claimant's words (which I have found were said) unambiguous? In my view they were not. Looked at in the context of the telephone exchanges in the afternoon of 2 March, they were ambiguous. In that context there is nothing which is a clear indication that the claimant was resigning his employment. In my view they were as much to do with the claimant's unwillingness to return to Paisley as they were about his concern that his coat was "*on a shaky peg*". Where ambiguous words of dismissal or resignation are used, the weight of authority suggests that the test for whether they should be regarded as amounting to a dismissal or resignation is objective, requiring consideration of how the words would have been understood by a reasonable listener. In my view the words used as understood by a reasonable listener meant that the claimant was irritated and annoyed about Ms Benham's instruction to return to Paisley. They were not a clear indication of his resignation from his employment.

46. Even if his words were unambiguous, ***Sothern*** requires a consideration of how the claimant's words were understood by the intended audience. In this

case, at its highest for the respondent, that audience was Ms Benham. But that requires a consideration of all of the words that he used. In my view they include not only what he said to Mrs Brady Rogon in the afternoon, but also what he said by text to Ms Benham at 18.03. Taking that into account, it was clear that he did not intend to resign. More importantly, however, on 3 March and by her own admission Ms Benham asked the claimant if he would resign. If she had understood that he had already resigned the day before, there would have been no need for her to ask that question. Indeed the behaviour most consistent with an understanding of him having resigned would have been to ask the claimant why he was on the premises on 3 March at all. Clearly, that question was not asked, nor did it appear to have been in Ms Benham's mind to do so.

47. Accordingly either the words were ambiguous and, viewed objectively, they did not amount to a resignation. Alternatively they were unambiguous but were not understood by the respondent as meaning that he had resigned. On either analysis, the claimant had not resigned his employment by the morning of 3 March. That being so, when Ms Benham said to him that he was redundant with immediate effect, that was a dismissal without notice. The respondent was therefore in breach of the contract's notice provisions. The respondent did not argue that in the circumstances it was (despite the label which Ms Benham gave to the reason for dismissal) entitled to dismiss him summarily. Accordingly the respondent was in breach of contract in its failure

to give notice of one month. Parties were agreed at the outset that the proper measure of the losses from that breach were £1468.00 being the claimant's net monthly pay. I have found that the respondent is liable to pay this sum which is ordered in the judgment.

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Employment Judge: Russell Bradley
Date of Judgment: 28 September 2021
Entered in register: 05 October 2021
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