



EMPLOYMENT TRIBUNALS

Claimant: Mr D Skelhorn

Respondent: Mr G Whittaker

Heard at: Liverpool **On:** 11 October 2021

Before: Employment Judge Ord

Representation:

Claimant: In person
Respondent: in person

JUDGMENT

The claimant's complaint of unfair dismissal is not well founded.

REASONS

The application and issues

1. The claimant's complaint is for unfair dismissal.
2. The issue for the tribunal is whether the claimant was dismissed or whether he resigned and, if he was dismissed, whether it was unfair.

Evidence

3. The tribunal had before it the following:
 - a. From the claimant, a two paged Email dated 22 September 2021 setting out his case, which included text messages.
 - b. From the respondent,
 - i. An email dated 27 July 2021 informing the tribunal that he had not received any information from the claimant stating how much he was claiming;

- ii. An email dated 4 October 2021, enclosing 8 pages of documents, and including a "Brief background and events from 2017" which set out the respondent's case;
 - iii. An email dated 6 October 2021, enclosing 4 pages of additional documents;
 - iv. An email dated 7 October 2021, enclosing a 2 paged email that served as a witness statement from a manager, Paul Openshaw, at Tuffnells.
4. It heard evidence on oath from the claimant and from the respondent, Mr Graham Whittaker.

Findings of Fact

5. The respondent is a haulage and delivery business and a subcontractor for Tuffnells Parcels, Haydock.
6. The claimant was employed by Tuffnells Parcels, Haydock, as a multi-drop driver from about June 2015 to about June 2016, when he resigned. In 2017 he applied to Tuffnells for his job back, but this was refused.
7. The evidence from Mr Whittaker, which was corroborated by written evidence from Paul Openshaw, a manager at Tuffnells, was that the reason for the refusal was the claimant's poor attitude towards staff and customers. The claimant did not deny that this was the reason given by Tuffnells, although he denied he had an attitude problem.
8. Tuffnells however were content for the respondent to employ the claimant, which meant he would be working from Tuffnells depot in Haydock. According to Mr Whittaker, this was on the proviso that the claimant did not upset staff or customers. This was not challenged by the claimant.
9. Under these circumstances, the tribunal accepts Mr Whittaker's evidence on these points.
10. The claimant's employment with the respondent, as a multi-drop driver commenced on 5 June 2017, based at Tuffnells, Haydock. On 21 April 2021 the claimant left work early saying that he had hurt his back.
11. The following day, being 22 April, he returned to work, arriving at about 6.50. There were a large number of items on his vehicle for him to deliver. The respondent says 72 and the claimant 81, although nothing turns on the exact number. When the claimant discovered the large load, he complained to Mr Openshaw about the number of deliveries and left work shortly thereafter. He did not return.
12. According to Mr Openshaw's written evidence, the claimant had walked off site before. The claimant admitted this in cross examination. The tribunal accepts this as a fact. Previously, however, Tuffnells and the respondent had given him the chance to go back.

13. Mr Whittaker did not have any other work for the claimant outside Tuffnells. The claimant was employed to work from Tuffnells, Haydock and that is the workplace address he put on his claim form.
14. The claimant has a brother, Daniel Skelhorn, who has experience of employment tribunals and who advised the claimant with respect to the events on 22 April. An email was sent from Daniel Skelhorn's account, but in the claimant's name, to Mr Whittaker on 23 April. It said the claimant had not been treated fairly and that the claimant left site as he had a back injury and was unable to carry out his work. It went on to say that the claimant then received a phone call from Mr Whittaker saying he was no longer allowed on site and no longer had employment with the respondent. It then went on to talk about disciplinary and redundancy procedure and statutory rights, and the claimant's intention to take Mr Whittaker to an employment tribunal.
15. On 27 April Mr Whittaker sent an email to the claimant saying he accepted his verbal resignation on 22 April.

Parties' disputed evidence on what happened on 22 April

16. The claimant's evidence is as follows:
 - a. His back was still sore and he told Mr Openshaw that it was too much for him, to which Mr Openshaw replied "what do you want us to do? The claimant said he couldn't do it and was going home. He asked Mr Openshaw to telephone Mr Whittaker because he did not have his mobile on him, but Mr Openshaw did not really listen to him and walked off.
 - b. The claimant then went to his car, found his phone and telephoned Mr Whittaker. At about 7.30 to 8.00 Mr Whittaker told him to go back to work, but the claimant replied that his back was too sore. Mr Whittaker then said that Tuffnells might not want the claimant back on site. As the day went on, that turned out to be the case.
 - c. The claimant denies resigning.

17. Mr Whittaker's evidence is as follows:
 - a. The claimant called him at 7.07. Mr Whittaker could not speak to him immediately but called him back at 7.25. The claimant was very angry and kicked off about the staff and managers and the number of deliveries on his vehicle. He said he'd had enough of the job and he'd left and gone home. He did not mention anything about his back.
 - b. Mr Whittaker asked the claimant to return to work and he'd try and sort something out with the deliveries. The claimant replied that he had no intention of going back to Tuffnells as they were a bunch of wankers.
 - c. In the afternoon the claimant telephoned Mr Whittaker to say Tuffnells had banned him from site. Mr Whittaker told him to calm

down and he'd arrange a meeting with Tuffnells. The claimant replied "No, No, No Graham, you're not listening; that's me done." At that stage Mr Whittaker understood that the claimant had resigned.

- d. The claimant said he would try and get employment elsewhere and commented that other customers might have work for him.
 - e. Mr Whittaker denied dismissing the claimant. He said that there was no sense in him sacking a good driver when there is a shortage of drivers. He had lost revenue and had lost the contract on the claimant's route.
18. Under cross examination the claimant admitted that he had "kicked off" at Mr Openshaw and other staff because he was angry. He also admitted that the respondent had not sacked him; he just didn't give him any work.

Text evidence

19. On 22 April at 7.21 there is a text message from Mr Openshaw at Tuffnells to Graham Whittaker saying "Hiya pal, he's walked off site saying hes took many on we were in the process of removing but hes gone, hes no phone so told us to ring you. Will speak to you later but tbh o know what's gonna be said about it pal. New driver needed for j26 me thinks."
20. At 8.14 the claimant text Mr Whittaker saying "Can you let me know if they don't want me back in there?"
21. A text from Mr Whittaker to the Claimant at 17.10 on 22 April said that Tuffnells were going to take at least 20 to 25 drops off the claimant but he didn't give them a chance to sort it. The claimant's reply was "Why didn't he say that then instead of *we took 31 off what do you want us to do*". He went on to say if they didn't want him back that was fine but he'd rather know now so he could start looking for another job.
22. At 18.41 that evening the claimant text Mr Whittaker asking if he had any other work for him, to which Mr Whittaker replied, not outside of Tuffnells.
23. The following day, being 23 April, at 9.47 the claimant asked Mr Whittaker "Am I being made redundant then?" to which Mr Whittaker replied at 12.06 "No mate You walked off from your job and refused to return when I asked."
24. None of the texts relating to happenings on 22 April mention any back problems.

Tribunal's inferences from the disputed evidence

25. There were too many deliveries on the claimant's vehicle on 22 April. This caused the claimant to get angry and shout at other staff at Tuffnells and to complain to Mr Openshaw. That much is not in dispute. Without waiting to see if Tuffnells would reduce the load, the claimant walked off site because he was angry, not because of any back problems. This is corroborated by the following evidence:

Mr Whittaker's precise account that the claimant tried to call him at 7.07; Mr Openshaw's text sent at 7.21, saying the claimant had walked off site; Mr Whittaker's text at 17.10 saying Tuffnells were going to take at least 20-25 drops off the claimant, but he didn't give them the chance to sort it; the fact the claimant had walked off site before; no mention in the texts about the reason being the claimant's bad back.

26. Whilst the letter of 23 April, sent from Daniel Skelhorn's account, claims the reason for leaving the site was the claimant's bad back, this letter appears contrived and written with the intention of making a claim. Therefore, the Tribunal gives little weight to it as a true reflection of what happened.
27. The tribunal accepts Mr Whittaker's evidence that there was a telephone conversation between Mr Whittaker and the claimant at 7.25. He was precise about the time which, in any event, was close to the more vague evidence of the claimant, who thought the conversation took place at about 7.30 to 8.00.
28. The claimant was angry. That is not in dispute. The tribunal does not accept the claimant's account that he told Mr Whittaker that he had left work because of his back for the reasons outlined above. The tribunal prefers Mr Whittaker's more credible and consistent account that the claimant told him he had had enough of the job and gone home and had no intention of going back.
29. It is not disputed that Tuffnells banned the claimant from site that day. The inference from this is that he had upset staff. The tribunal accepts Mr Whittaker's evidence that, when he found out about this via a telephone call with the claimant, he offered to set up a meeting with Tuffnells but the Claimant's reply was "No, No, No Graham, you're not listening; that's me done." Consequently, Mr Whittaker took this as the claimant's resignation. Whilst the claimant denies this, Mr Whittaker was clear in his recollection, specific in the detail and consistent. Consequently, the Tribunal prefers Mr Whittaker's evidence.

The Law

30. Section 95 of the Employment Rights Act 1996 states, as far as is relevant:
 - (1) For the purposes of this Part an employee is dismissed by his employer if.....
 - (a) The contract under which he is employed is terminated by the employer (whether with or without notice);
31. The burden of proof falls on the employee to show that a dismissal took place and the standard of proof is on a balance of probabilities. Therefore, the question for the tribunal is "Was it more likely than not that the contract was terminated by dismissal rather than by resignation?"
32. 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 – *Southern v Franks Charlesly and Co* 1981 IRLR 278, CA. There might be an exception in the case of a decision

taken in the heat of the moment. In such circumstances, it may be appropriate to investigate the context in which the words were spoken in order to ascertain what was really intended and understood.

33. There is a well-established principle in the construction of commercial contracts that any ambiguity is likely to be construed against the person seeking to rely on it. In *Graham Group plc v Garratt EAT 161/97* the EAT held that this principle should also be applied to ambiguous words or acts in the context of a dismissal or resignation.
34. Broadly speaking, the test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one; all the surrounding circumstances should be considered. If the words are still ambiguous, the tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances.
35. When considering all the circumstances, tribunals will look at events both preceding and subsequent to the incident in question and take account of the nature of the workplace in which the misunderstanding arose.

Conclusion

36. The burden of proof is on the claimant to show that he has been dismissed.
37. On the morning of 22 April 2021, the claimant was angry at work and walked off site without waiting for a response to his problem. He told the respondent that morning in a telephone call that he had had enough of the job and gone home. When encouraged to return to work, the claimant replied that he had no intention of going back. That afternoon, in another telephone conversation, in which the respondent tried to set up a meeting with Tuffnells, the claimant said “No, No, No Graham, you’re not listening; that’s me done.”
38. In the tribunal’s view these words were unambiguous in demonstrating that the claimant was resigning from his job at Tuffnells. Even if they were ambiguous, in all the circumstances, taking account of the two telephone conversations and the claimant’s act of walking out on the job, his words would reasonably have been understood as being words of resignation.
39. Objectively, these words would be taken to mean not just that the claimant was refusing to return to Tuffnells, but that he was leaving the respondent’s employment altogether, as Tuffnells was his only place of work with the respondent. This is how a reasonable employer would have understood them and it is how the respondent understood them, as confirmed in his letter of 27 April 2021, accepting the verbal resignation.
40. Although the text of 18.41 on 22 April shows that the claimant was looking for other work with the respondent, by that time, the afternoon resignation conversation had already happened. Mr Whittaker was entitled to treat that conversation as not being in the heat of moment, because the claimant had talked about going to work for other customers and this shows that he had thought it through.

41. In cross examination the claimant admitted that the respondent had not sacked him, but just had not given him any work. However, the respondent was unable to give him work, as the claimant had been barred from his workplace at Tuffnells, due to his own actions. This does not amount to a dismissal.
42. In conclusion, the claimant has not demonstrated on a balance of probabilities that he was dismissed. Consequently, the tribunal finds that the claimant was not dismissed. Therefore, his complaint of unfair dismissal is not well founded.

Employment Judge Liz Ord

Date 1 November 2021

JUDGMENT SENT TO THE PARTIES ON

8 November 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.