



EMPLOYMENT TRIBUNALS

Claimant: Mr A K Robson

Respondent: Eric Roberts Contractors Ltd

Heard at: Bristol Employment Tribunal via HMCTS Video Hearings service

On: 22 and 23 December 2021

Before: Employment Judge Cuthbert

Representation

Claimant: In person

Respondent: Terry Falcao, Solicitor

The following judgment reasons were delivered orally at the conclusion of the hearing. Written reasons were requested at the hearing on behalf of the respondent pursuant to rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant brought a claim for unfair dismissal in an ET1 presented on 1 March 2021. The case came before the tribunal for a two-day unfair dismissal hearing, via the Video Hearings service, on 22 and 23 December 2021. The claimant appeared in-person and the respondent was represented by Mr Falcao.
2. The parties confirmed at the start of the hearing that they were content to proceed with a video hearing and, save for (i) a very short period during

the afternoon of 22 December, when there was a problem resuming after a comfort-break which subsequently resolved itself, and (ii) a short interruption during delivery of the oral judgment. the hearing proceeded without any technical issues.

3. The respondent's witnesses, with the exception of Mr Randall, gave evidence from a conference room at the respondent's solicitors' offices. I explained that when giving evidence they must not communicate with others present and I was satisfied that this was the case when they did so.

Issues

4. The issues were agreed with the parties at the outset of the hearing, as follows:

Unfair dismissal

5. Was the claimant dismissed? The burden was on the claimant to prove that he was dismissed. The claimant expressly confirmed that he was claiming that he was dismissed by the respondent and that he did not resign from his employment.
6. If the claimant was dismissed, the respondent in effect accepted that there was no potentially fair reason for dismissal for the purposes of s.98(2) of the Employment Rights Act 1996 and furthermore that no fair procedure would have been followed were the claimant to be found to have been dismissed.
7. In effect the unfair dismissal claim therefore turned solely upon whether or not there was a dismissal.

Remedy (if it became relevant)

8. If the claimant was dismissed, what basic award was payable (less any redundancy payment made)?
9. If there was a compensatory award, how much should it be?
10. Did the Acas code apply?
11. The respondent had asserted a potential illegality defence in the ET3 but confirmed at the start of the hearing that this was not being pursued as such at the hearing before me.
12. The respondent's ET3 also referred to a potential counterclaim against the claimant concerning the return of a van which remained in the claimant's possession and which the respondent asserted remained the property of the respondent (see further below). Mr Falcao accepted, however, that I had no jurisdiction to deal with that counterclaim, given that the claimant was not pursuing a breach of contract claim in these proceedings and in any event even if he had been, I would have had no power to deal with a

counterclaim for the return of disputed property, as counterclaims in the tribunal are limited to claims for damages only. I indicated that I would avoid making any findings on the specific issue of the disputed van which could impact on any separate civil proceedings which may arise.

Evidence and Practicalities

13. I was provided with a 128-page bundle of documents (and references to page numbers in these reasons are to that bundle).
14. I considered and heard witness evidence as follows:
 - a. The claimant adduced a five-page witness statement – this was unsigned but the claimant affirmed the content of that statement under oath and gave oral evidence.
 - b. On behalf of the respondent, I heard oral evidence from:
 - i. (William) Eric Roberts – owner of the respondent and director – he also provided a four-page signed witness statement.
 - ii. Stacey Grainger – Office Manager (previously administrator) – he also provided a three-page signed witness statement.
 - iii. David Cox – nephew of Mr Roberts and his attorney from 14 October 2019 for his business affairs – he also provided a six-page signed witness statement. Mr Cox is also employed by the respondent and was recently appointed as a director
 - iv. Gary Randall – accountant and managing director of Prydis Accounts Ltd, the respondent’s accountants – he also provided a two-page signed witness statement and appended P11 form.
15. I was also provided by the respondent with a three-page signed witness statement dated 8 December 2021 from Matthew Gummow, currently an Operations Manager of the respondent and previously an Estimator. As Mr Gummow did not attend for cross examination, I did not afford his statement as much weight as that of those who gave evidence orally. He had very little involvement in the relevant issues in any event.
16. I discussed any adjustments needed during evidence with the parties. Mr Roberts had various health issues (see below) and it was agreed that questions would be asked more slowly and repeated if necessary. He was also assisted by Mr Falcao during his evidence to locate documents to which reference was made and given more time to read them.
17. I also explained to the unrepresented claimant that, when cross examining the respondent’s witnesses, he should put his own case to them and challenge the evidence of the respondent’s witnesses with which he disagreed. It was evident during the hearing that he had prepared in advance a list of questions for each witness on this basis.

Findings of fact

18. I only made findings of fact where those were required for the proper determination of the issues in this claim. I therefore did not make findings on each and every area where the parties were in dispute with each other.
19. There were few documents before me, or seemingly in existence, which were directly relevant to the key issues in dispute in this case and so I necessarily based my findings largely upon the witness evidence. Generally, I preferred the evidence of the respondent's witnesses where there was a material issue of dispute, particularly in relation to the events which took place on 20 January 2021. Their accounts of those events and of their responses and reactions, which they described in evidence, were more compelling and credible than the account of the claimant of his actions on that day.
20. The respondent is a small highway and private premises surfacing company based in Cornwall, which employed 21 people at the relevant time. It is a private limited company.
21. The claimant commenced his employment with the respondent in 2011 as a Transport Manager. I understand that this role was required in order to for a business such as the respondent to hold a HGV operators' licence.
22. In October 2019, following the departure of some previous directors of the respondent at that time, under a cloud it seems to be agreed, the claimant was promoted to director. From that point up to and including the time of the relevant events in early 2021, the only two directors of the respondent were:
 - a. Mr Eric Roberts (also the 100% shareholder in and owner of the respondent); and
 - b. the claimant.

Mr Roberts' health

23. Mr Roberts and his health were matters which seemed to be fairly common knowledge at the respondent and were not suggested as being in any way confidential for the purposes of these proceedings.
24. Mr Roberts was 88 years' old at the time of the key events in question in January 2021 and was 89 when the case came before me. I saw extracts from his medical records which included diagnoses and supporting evidence of the following issues and conditions:
 - a. mild cognitive impairment (Oct 2016)
 - b. vascular dementia (Dec 2018)
 - c. dementia/Alzheimer's disease (Jan 2019)
 - d. atrial fibrillation (Dec 2020)

25. Mr Roberts also recalled during his evidence that he had suffered what he believed to be a mini-stroke shortly before the disputed meeting on 20 January 2021 (see below), which he had discussed with his GP. His GP records from 15 January 2021 did record that he had some difficulties overnight and on other nights and he was having problems with his right hand but the notes indicate that in the GP's view there were "*no clear signs*" of a stroke at that time. This suggested that the possibility of a stroke was discussed. It was nonetheless clear that Mr Roberts had a number of serious underlying health issues and that these had taken a turn for the worse in late 2020.
26. On 14 October 2019, a Lasting Power of Attorney was registered in respect of Mr Roberts, with his nephew Mr Cox appointed as his attorney. Mr Cox was not at that time employed by the respondent but was subsequently employed during 2020. This power of attorney expressly (see page [89]) gave general authority to Mr Cox to act in relation to the respondent's business "*to be included in making any decisions regarding that business as I myself would*".
27. In practice, it appeared that very few decisions at the respondent were expressly made with reference to the power of attorney, but that Mr Roberts and Mr Cox were often consulted with jointly by the claimant about the running of the respondent's business, for instance in respect of two staff redundancies in early 2021.
28. I accepted the evidence of Mr Cox that Mr Roberts was, as a result of his dementia, forgetful and could struggle with concentration and understanding when information was presented to him which was unexpected or substantial in volume. Mr Grainger gave evidence to the same effect that Mr Roberts would regularly forget things and would write things on small pieces of paper, which I also accepted.
29. The claimant was aware of the main health issues of Mr Roberts and of the existence of the limited power of attorney.

The claimant's appointment as director

30. There was dispute as to whether the claimant was a "director" or "managing director" for the respondent. There was no documentary evidence about his appointment. I find that on a day-to-day basis from the period between October 2019 and January 2021 the claimant was in effect the most senior day-to-day manager for the respondent and acted, and was treated, as such.
31. The claimant's case was that he was appointed to the director role by Mr Roberts in 2019. Mr Roberts recalled in his witness statement that Mr Cox appointed the claimant but in his oral evidence recalled that he had made the decision, whereas Mr Cox recalled that he recommended the claimant's appointment to Mr Roberts but did not specifically address who appointed the claimant. Again, there were no contemporaneous documents to assist with recollections or my findings. I find that the claimant was most likely appointed by Mr Roberts in consultation with Mr

Cox, but that following his appointment, most of the management of the company was in any event undertaken by the claimant.

32. The claimant's pay package was another source of dispute and again there was an almost complete lack of documentation as to what was agreed and why. There seemed to be no doubt that he agreed with the respondent to defer some of his increased salary of £55,000 on promotion, roughly £200 of his weekly pay, and to receive that at some future date and so was instead paid a weekly sum of £798.23 gross, £589.73 net.
33. I acknowledge that there was a dispute between the parties as to the basis of this deferred compensation arrangement; the claimant's case was that this was proposed by Mr Roberts and Mr Cox due to "*fraudulent actions*" by previous directors. The respondent's case was that the arrangement was requested by the claimant because he wished to conceal his true earnings from his wife from whom he was divorcing, for the purposes of any financial divorce settlement. I did not find it necessary to reach any finding on this dispute for the purposes of the issues I needed to decide in these proceedings.

The claimant's employment between 2019 and early 2021

34. A notable feature of this unusual case is that both sides were in almost complete broad agreement about the claimant's performance following his appointment as a director in late 2019 right through until the termination of his employment in January 2021. In essence, the claimant did a good job for the respondent in managing the day-to-day running of the business during this period, despite the challenges of COVID.
35. There were occasional minor disagreements between the claimant and Mr Roberts, for example over the purchase of a tipper truck. The claimant accepted that on one such occasion, he may have responded to the effect that Mr Roberts should make all of the decisions if he were not happy. Mr Cox's evidence was to the effect that the claimant, on the occasions when he was criticised, would reply that he would happily leave or let someone else take charge, as a threat. However, overall, the employment relationship appears to have been a happy one.
36. In around mid-2020 the claimant wished to reduce his working days to four days per week, with Monday as a non-working day. This was for personal reasons, to spend more time with his partner. Initially he appeared to have taken annual leave to achieve this, but then had a discussion with Mr Roberts in October 2020 about it.
37. In his evidence to the Tribunal, the claimant said that he discussed this proposed four-day arrangement whilst alone with Mr Roberts, Mr Roberts was in agreement and this was followed up in a text message to Mr Randall, the accountant. The claimant said in evidence that he did also consult with Mr Cox prior to speaking to Mr Roberts about this same issue, and Mr Cox told him to just take the day off and not to tell Mr Roberts "*as he will forget it anyway*". A text message exchange at page [95] between the claimant and Mr Randall indicated that the claimant wished to

formalise the four-day working week from 1 November 2020. In a text message on 19 October 2020 to Mr Randall, the claimant also mentioned having spoken to Mr Roberts earlier that morning and Mr Roberts “*said he was ok with it but may tell you something different*”. It is clear from the exchanges on this reduction in hours issue that the decision-making capability of Mr Roberts was in some doubt because of his memory issues.

38. In his own evidence to the Tribunal on this same issue, Mr Roberts said that initially he had not disagreed with the claimant working four-days and so this had carried on and he left it, but eventually did agree with the claimant that the claimant could cut back to four days. He said that whatever the claimant had done (in the context of this arrangement), he was happy with and if the claimant was happy, that was “*fair enough*” with him.

Mr Roberts’ level of involvement in the respondent’s business

39. On a more general level, the claimant’s account was, in summary, that Mr Roberts was and remained fairly heavily involved in running the respondent’s business throughout this 2019 to 2021 period and indeed the claimant suggested that Mr Roberts’ involvement in the business had picked up towards the end of 2020.
40. Mr Roberts’ evidence, to the contrary, was that he had tried to take a step back from being heavily involved in the respondent’s business following his diagnosis of dementia, which is unsurprising. He had suffered heart complications in December 2020 and it had taken him time to get back to his usual self. He had difficulty concentrating and absorbing information and became tired quickly.
41. The medical records indicate that Mr Roberts’ GP referred him to a Heart Function Clinic on 14 December 2020 due to shortness of breath and atrial fibrillation (pages [65] and [72]) – the same notes suggested a follow-up appointment in two to three weeks “*but not sure he will remember*”. On 15 January 2021, he was noted by the GP to still be short of breath and wheezing (page [64]). Against that medical backdrop I find it implausible that Mr Roberts was generally **increasing** his involvement in the respondent’s business at this time.
42. I also find that Mr Roberts, despite his various health issues, did nonetheless take as active an interest as possible in what was a family business which he had largely built. For example, Mr Roberts was asked in cross examination about his involvement in key decisions on pricing and equipment. He said that he did not really make these decisions himself – if the purchase of a large piece of equipment was being discussed, he would try to help and say what he thought about the proposal and “*kick it around*” but that others also come up with options and decide what to do. In effect, I find that Mr Roberts made such suggestions, but in reality the day-to-day running of the respondent’s business during the relevant period before the end of the claimant’s employment was in the hands of the claimant.

43. The claimant did discuss other matters with Mr Roberts and with Mr Cox jointly, for example two staff redundancies which were implemented around two weeks before the termination of the claimant's own employment, with which the claimant said they all agreed, but the strong impression from the evidence was that the claimant was managing the business overall.

Events in January 2021

44. There was a downturn in the respondent's business at the end of 2020 and into early 2021. Some staff were furloughed and as noted previously, two were made redundant in early 2021.
45. A meeting took place on Wednesday 20 January 2021 between the claimant, Mr Roberts, Mr Cox, Mr Grainger (Office Manager) and Mr Gummow (then in the role of Estimator), which came about as a result of the downturn and was intended to discuss how to address this.
46. There was a dispute between the parties as to precisely how the meeting came about, and who requested it and to what end. It did appear that, prior to the meeting, Mr Roberts had commented to Mr Gummow to the effect that, if the business was quiet, why was the claimant taking Mondays off but there was no evidence of any broader underlying concerns about the claimant or his performance on the part of the respondent or of any prior intention on the respondent's part to terminate the claimant's employment. There were, again, no documents to shed any light on this general meeting but in any event I did not consider this particular dispute about the meeting arrangements to be material, in view of how events at the meeting itself unfolded.
47. At the meeting itself, which took place in the respondent's main office room, various issues relating to the respondent's business were discussed. There were no notes of the main meeting. The issues discussed were relatively innocuous, about various aspects of the respondent's business. Mr Cox recalled mention made by Mr Roberts of waste materials being dumped in the yard and it being more cost effective to take them straight to the dump. Mr Roberts recalled mentioning an issue about filling additional potholes at no extra cost, for customer service purposes. The claimant recalled mention of companies from Devon undercutting the respondent, although in cross examination he accepted this was not a criticism of him. The claimant then stated in his evidence that Mr Roberts started to make "*some other comments*" about pricing, which the claimant felt were personal, on the basis that the claimant was responsible for pricing.

Meetings in the small office on 20 January 2021

48. The claimant then invited Mr Roberts, and Mr Roberts alone, into a small office adjoining the main office to carry on the meeting in private. This was significant in my view, in that it was not Mr Roberts who instigated the smaller private meeting which followed, as might be expected if there were some prior intention to dismiss the claimant, but rather the claimant

himself. The claimant also did not invite Mr Cox into that meeting, despite Mr Cox being present and it being clear that Mr Cox and Mr Roberts often acted together, in their discussions with the claimant, on issues such as the recent redundancies in the company.

49. It was put to the claimant in cross examination by Mr Falcao that, in so taking Mr Roberts aside, he was seeking to isolate Mr Roberts and reference was made to Mr Roberts being taken advantage of by the claimant's predecessors, although the claimant disputed that this was the case on his part.
50. The claimant's account of the meeting which followed between himself and Mr Roberts in the small office was as follows. The claimant said that he asked Mr Roberts if there was an issue which needed to be discussed. He said that Mr Roberts paused and then said that he did not like the way the claimant was running the business and that the claimant had been running the company down. He said that Mr Roberts raised an issue about vehicles in the yard but staff being at home. The claimant said he asked Mr Roberts *"what are you trying to say, you are making me redundant?"* and that Mr Roberts replied *"yes"*. At this point the claimant left and asked Mr Grainger, the office manager, to join them.
51. Mr Roberts on the other hand said that on entering the small office with the claimant, the claimant immediately told him, *"If you aren't happy with the way I am running the business, I'll go. I'll take the van in lieu of the money you owe me but will still be the Transport Manager and be here for the boys"*. The claimant would not let Mr Roberts get a word in. Mr Roberts said that he was in shock and did not really know what was going on. Mr Roberts said, during cross examination by the claimant, that he *"never opened [his] mouth"* in the meeting; he said that he had received quite a shock and had no-one else to run the respondent's business other than the claimant; he said that he could not grasp it all, that he was dumbfounded and did not know what to say, and that the claimant then disappeared.
52. The other witnesses who had remained in the larger room described this meeting between the claimant and Mr Roberts behind closed doors in the small office as being very short, a minute or two. There were no contemporaneous documents or other records in respect of it.
53. It is not disputed that the claimant then returned to the main meeting room and asked Mr Grainger (but again not Mr Cox) to then join him and Mr Roberts in the small office to make some notes.
54. Mr Grainger made a handwritten note of the second meeting in the small office, which the claimant agreed was accurate. Mr Grainger said in evidence that his notes reflected what the claimant said to Mr Roberts during that meeting. They stated as follows:

Eric Meeting

Making Andrew Redundant

Redundancy figures

12 weeks notice period (payment in lieu of 12 weeks) end of week 22nd Jan

Andrew to keep van instead of extra payment for his year taking over from Tony

O[perating] licence is with Andrew, need transport mgr

Resignation for directorship

55. Mr Grainger said that he himself was in complete shock and felt ambushed when he entered the room and the claimant started speaking. He recalled Mr Roberts nodding at one point but did not recall Mr Roberts as saying anything whatsoever during the meeting. Mr Grainger added that when Mr Roberts was not comfortable, he would look down at papers and not at people's faces and that is what he did during this meeting.
56. Mr Roberts also said that he did not say anything during the second meeting with the claimant in the small office with Mr Grainger present. He said that he would not know how to make somebody redundant. He said that he did not want the claimant to leave as he had no-one to fill his role. He said that the one slight comfort for him was that he understood the claimant may be prepared to remain on as Transport Manager (a role which related to the respondent's HGV operating licence).
57. The claimant said that during this subsequent meeting, he asked Mr Roberts to confirm that he was making the claimant redundant, to which Mr Roberts nodded and then was asked again and answered "yes". The claimant said that he then asked Mr Roberts when he wanted the claimant to finish and Mr Roberts asked the claimant if he had anyone who "*could pick [him] up now*". The claimant said he said he had things to tie up before his departure and so it was "*agreed*" by Mr Roberts during the second meeting that he would receive 12 weeks' pay in lieu of notice and would finish on Friday 22 January and that Mr Roberts also agreed to transfer a company van to him in lieu of additional salary not taken following his appointment as a director, and a payment in lieu.
58. The claimant was asked during cross examination by Mr Falcao if it would seem bizarre for the respondent, in the circumstances, to have asserted that he was running the company into the ground and for him to be made redundant. He agreed that this seemed "*very bizarre*".
59. Based upon the following factors:
 - a. my impression of the witnesses during oral evidence, including Mr Roberts who came across as credible and compelling despite his health difficulties, readily acknowledging events which he could not recall and appearing genuinely perplexed about why the claimant may have acted as he did in January 2021;
 - b. the inherent implausibility of Mr Roberts dismissing the claimant in circumstances where the business was going through a challenging

time, where no ready replacement existed for the claimant in his general management role or his Transport Manager role, and where the claimant was generally very well regarded by the respondent and its staff; and

- c. the claimant's own immediate response to the situation at the time, as a long serving employee who (on his own account) was being dismissed without apparent cause or justification, and yet he raised no protest or concern about this, either on 20 January itself or before the termination took effect on 22 January 2021, and as detailed below he even prepared his own termination letter on 20 January. His focus appears to have been solely upon securing a favourable leaving package and I find his actions to have been inconsistent with those of an employee who genuinely considered that they have just been unjustifiably and unfairly dismissed

I therefore preferred the accounts of the respondent's witnesses of the events of 20 January 2021 to that of the claimant.

The letter the claimant prepared dated 21 January 2021

60. Following the meeting on 20 January, that same afternoon, the claimant prepared a draft termination letter, in the name of Mr Roberts. He modified the letter slightly, but not materially, the next day and the final version reads as follows:

21st January 2021

Dear Andrew

Following our meeting yesterday, I must inform you that your position of Director with Eric Roberts Contractors Ltd has been made redundant. The Governments statutory notice period of 12 weeks will start from 23rd January 2021 and your last day of employment will be 16th April 2021.

As it has been mutually agreed, the option of being paid in lieu of notice has been accepted by yourself and your final working day will be Friday 22nd January 2021.

All keys, bank cards, company property, etc will be required to be handed in by close of business on this day.

Your redundancy payment will be £7,263.00 which has been calculated using the governments redundancy calculator and is based on your years of service and your salary based of the preceding 12 week period. This figure is not subject to deductions and will be paid with your final pay instalment.

It has also been mutually agreed that your company vehicle will be transferred to you as an additional lieu of payment.

Any annual leave you have accrued but not taken will be added to your final pay instalment.

If you feel your redundancy selection has been unfair, you can appeal against the decision within 7 days from receipt of this letter. This must be in writing to me, setting out the reasons for the appeal.

I would personally like to thank you for your hard work and commitment shown during your employment and wish you the very best for the future.

Yours sincerely

Eric Roberts

Director

Eric Roberts Contractors Ltd

61. Mr Grainger accepted that the claimant showed him a copy of the letter. The claimant said that he based the letter on a template (it was saved in a shared folder on the respondent's computer system called "*HR/Employment Termination /Andrew redundancy letters*"). The claimant's explanation as to why he prepared it was that there was "*no other member of staff that dealt with HR issues*" and so he said that he considered it unlikely that he would otherwise have received anything from the respondent.
62. The claimant's account of events was that he was shocked by having been made redundant out of the blue but, as already noted, there was no evidence before me to suggest that, during the two days before the termination of his employment took effect on 22 January 2021, he protested against any perceived unfairness or dismissal or questioned what was, on his account, a decision by Mr Roberts to terminate his employment. On the contrary, he drafted his own letter of termination from the respondent which was focused primarily on confirming the various entitlements which he was seeking on termination.
63. Mr Grainger in his witness statement indicated that the claimant, on 20 January, "*went home very easily that day and did not appear to be upset*". The claimant challenged this in cross examination and Mr Grainger confirmed that, for the claimant, the events of the day appeared "*like a normal day at the office*". Mr Grainger added that he himself was shell-shocked and did not think that he was the only one, but to the claimant the day's events appeared to be "*water off a duck's back ... you would never know anything had gone on*".
64. I make no findings in these proceedings as to whether or not the claimant was lawfully entitled to the "*redundancy payment*", the "*payment in lieu of notice*" or to retain the company van, as these are not issues which I am required to determine. I do note that the disputed van was said by the respondent to have a value in excess of £20,000 whereas the claimant values it at £12,800. In either case, I regard this as substantial. I also note that the value of the notice pay, the tax-free redundancy payment and the

van (taken on the claimant's lower valuation) equates to around 45 weeks' net pay for the claimant (based on his weekly take-home pay of £589).

Events later that week

65. On 21 January 2021, the claimant presented Mr Roberts with a copy of the termination letter which the claimant had drafted.
66. The claimant said that he identified this to Mr Roberts as his "*redundancy letter*" based on notes from Mr Grainger.
67. Mr Roberts said that the claimant had asked to see him that day and was carrying a booklet of papers and merely asked him to sign a document on top of those papers. Mr Roberts said that he regularly signed papers and documents for all of his team and almost never read what he was signing. He trusted the claimant and so he signed the document which was presented by the claimant without reading it or asking what it was. Mr Roberts did say in oral evidence that he assumed what he was signing was an agreement that the claimant took the van and wages and would be staying on as Transport Manager, but affirmed that he had not read the document.
68. Mr Cox was not involved in the signing of the letter but did see it subsequently. He summarised his impression of the position during cross examination by the claimant as follows: *The way you conducted yourself, the way you wrote the letter out as if Eric had written it – I knew it was nothing to do with Eric as he would have told me if so – he was as stunned as we all were. It seemed you took over that afternoon on 20th and dictated what you wanted and no-one was arguing with you as your made mind was made up*".
69. There was some discussion between the claimant and Mr Cox that week as to whether the claimant might remain on with the respondent in a limited capacity of Transport Manager, but this was not ultimately agreed upon.
70. The claimant asserted that the respondent offered Mr Gummow his managing role for the respondent but I have seen no evidence that this was in fact the case. Mr Gummow stated in his witness statement that he has not replaced the claimant or been offered his role. He said that he has taken on a role of Operations Manager for the respondent as there was no-one else in a position to do so.
71. The claimant made arrangements with Mr Grainger to receive the payments set out in the letter of 21 January. Mr Grainger said that he did not question the amounts or the claimant's entitlement to them and trusted the claimant. Mr Grainger in turn passed on a request to make them to the respondent's payroll manager and they were paid accordingly.
72. Mr Roberts said in evidence that it had appeared to him that the claimant had made his mind up to step down from the managing role, which disappointed him as the claimant was good at what he did. He believed initially that the claimant would be remaining as Transport Manager from

the following week (i.e. week commencing 25 January) but said that the claimant informed him on the Monday or Tuesday of that week that he would not be returning and that his last day was the previous Friday (22 January).

73. The claimant's resignation from his role of director at Companies House took effect on 22 January 2021.
74. I find that the claimant's employment terminated on Friday 22 January 2021.
75. On Tuesday 26 January 2021, the claimant attended the respondent's offices and handed a letter to Mr Roberts. This letter came out of the blue in view of the events the previous week, as I have found them, and stated as follows:

26th January 2021

Appeal against a Redundancy Dismissal Decision

Dear Eric,

I am writing to formally appeal against the decision to dismiss me because of redundancy on 20th January 2021 and confirmed in writing on 21st January 2021.

My reasons for appeal are as follows –

- I feel the decision was made on a personal nature and not a business critical decision.*
- The reasons presented for my redundancy were not valid or substantiated.*
- At no point prior to this was there any consultation with me regarding this decision.*
- The formal redundancy/dismissal procedure was not followed*

I would be grateful if you would let me know when and where we can discuss my appeal further.

Yours sincerely

Andrew Robson

76. The claimant said that Mr Roberts put the letter in his pocket on receipt. Mr Roberts took no action in respect of this letter and in oral evidence did not specifically recall receiving it. The appeal letter did come to Mr Cox's attention subsequently but it is not in dispute that the respondent took no positive steps to respond to the claimant following its receipt.
77. The following day, Wednesday 27 January 2021, the claimant exchanged some text messages with Mr Grainger which are at pages [108] – [109]. Mr Grainger's evidence was that he considered the claimant as a friend

and the exchange in question indicates that they were close. The exchange was as follows:

27 January 2021

Hi Andrew, I will give you a bell Friday. Did you get your SAGE wages notification and was it correct. That mad old fucker has been in every day [17.50]

Hi Stace, payslip all received thanks and call me anytime evenings, whatever. I haven't rung you cause I dont want to put you in any situation. Has he said anything about the letter I dropped in [17:53]

Yes, but it's not really making anything of sense to him. He literally repeats himself every time he comes in. I've told Dave I don't want to be dragged in but you were made redundant end of story. To be fair to Dave (I won't say that very often) he has been trying to convince him of exactly what has gone on [17.58]

78. Both Mr Grainger and Mr Cox gave oral evidence that Mr Roberts appeared to be confused by the claimant's actions in the days following the events of 20 January. This evidence is consistent with the above exchange between the claimant and Mr Grainger via WhatsApp, one of the few contemporaneous documents in the case.
79. Mr Grainger was asked by the claimant in cross examination what he meant by his comment in the above exchange, "*you were made redundant end of story*". Mr Grainger said that he meant that it was the claimant's position that he was made redundant and that Mr Grainger did not wish to be involved in a dispute about it with Mr Cox. I accepted that explanation.
80. I also asked Mr Grainger what he meant by the comment in the same exchange of messages "*he has been trying to convince him of what exactly has gone on*". He explained that Mr Roberts "*didn't understand a thing going on...it was a shock to all of us and was not discussed. We were asking 'what do we do now?, 'Where do we go from here?'*". This evidence is consistent with the respondent's staff, including Mr Roberts, being in shock at what had occurred on 20 January 2021 and I accepted it.
81. Mr Cox has said that he did later report the taking of the company van by the claimant to the police, following legal advice, and has been verbally provided with a crime reference number and I accepted that evidence. The respondent was informed by the police that the dispute was a civil matter and so the police would not take further action.
82. I noted that Mr Cox was appointed as a director of the respondent in June 2021, over four months after the end of the claimant's employment. I attached no significance to that fact.
83. Following the termination of the claimant's employment with the respondent, he became his elderly mother's full-time carer and moved in with her. According to the claimant's schedule of loss, he started a new

full-time role with a civil engineering company on 5 October 2021, on somewhat lower pay than he received at the respondent.

Law

84. The relevant sections of the Employment Rights Act 1996 are as follows, contained within Part X (Unfair Dismissal), Chapter I (Right not to be unfairly dismissed):

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

...

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

...

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

85. The burden of proving that there has been a dismissal within the meaning of s.95(1) rests upon a claimant and so in the case the claimant needed to satisfy the tribunal, on the balance of probabilities, that he had been dismissed. Only if he did so, would s.98 become relevant.

Discussion and Decision

86. I heard oral closing submissions from Mr Falcao on behalf of the respondent and then oral closing submissions from the claimant. I was not referred to any authorities by either party.
87. The respondent's case, in summary, was that the claimant was not dismissed by the respondent and that he resigned from his employment. The claimant's case was that he was dismissed for redundancy by Mr Roberts, that there was no redundancy situation in existence, no fair process was followed and so he was unfairly dismissed.
88. The key issue in dispute in this case was whether or not the claimant was dismissed by the respondent. This needed to be decided against the backdrop of what was a very unusual set of facts.
89. The claimant's case was that he was expressly dismissed by the respondent, i.e. within the meaning of s.95(1)(a), namely that his contract of employment was terminated by the respondent. This in turn, on the facts of this particular case, depended upon him establishing on the balance of probabilities that he was dismissed:

- a. by virtue of what was said to him in the meetings in the small office with Mr Roberts on 21 January; and/or
 - b. by virtue of the letter which the claimant prepared dated 21 January which was signed by Mr Roberts.
90. I find that the claimant was **not** dismissed during either of the two meetings of 20 January 2021. I accepted Mr Roberts' account of those meetings, and that of Mr Grainger of the second meeting, for the reasons given earlier. In summary:
 - a. in the first meeting, the claimant told Mr Roberts, out of the blue, that if Mr Roberts was not happy with the way the claimant was running the business, the claimant would leave. The claimant said that he would take a company van in lieu of money which he said he was owed. Mr Roberts was in shock and did not speak during this short meeting, and the claimant then left to bring in Mr Grainger; and
 - b. in the second meeting, when Mr Grainger entered the room, the claimant started speaking and set out various matters to which he said was entitled on redundancy. Mr Roberts and Mr Grainger were in shock and, at most, Mr Roberts may merely have nodded at one stage, but he appeared very uncomfortable to Mr Grainger and again Mr Roberts did not speak during this meeting.
91. Mr Roberts, who was an 88-year-old man with dementia, therefore did not say anything in either meeting and it was only the claimant himself who mentioned "*redundancy*". Mr Cox, who had a power of attorney for Mr Roberts and who had been involved in many decisions and in previous redundancy situations, was not present in either meeting. The claimant did not therefore prove that a dismissal by the respondent occurred for the purposes of s.95(1)(a) during the meetings.
92. I also find that the claimant was **not** dismissed by virtue of the letter which the claimant prepared and which he presented on 21 January 2021 for Mr Roberts to sign and which Mr Roberts then did sign. I accepted Mr Roberts' evidence, against the backdrop of him being 88 years old and suffering from dementia, that he did not read the letter or know what he was signing. Again, I noted that Mr Cox, who had the power of attorney for Mr Roberts and who was involved alongside him and the claimant in various decisions on behalf of the respondent, was not involved by the claimant in either the preparation of or the signing of the letter. The letter was, in addition, premised upon the claimant's version of the events of the previous day, which I have found did not occur as he asserted they did. In all of the circumstances of this unusual case, including those of the meetings the previous day to which this letter purported to give effect, I find that the claimant did not prove that this letter amounted to a dismissal by the respondent for the purposes of s.95(1)(a).
93. For the avoidance of doubt and for completeness I also do not find that the claimant proved that any other events or occurrences about which I heard

evidence during these proceedings amounted to a dismissal of the claimant by the respondent for the purposes of s.95(1)(a).

94. I do in passing say that I found it somewhat odd that the respondent did not seek, at any stage before the presentation of the ET3, to challenge the claimant's apparent position that he had been dismissed for redundancy, particularly following sight of the appeal letter by Mr Cox. I took into account, however, the fact that the respondent is a small company and as the claimant accepted in evidence, he had dealt with their HR issues for them and so in his absence there would have been no-one to do so. It had also become plain to the respondent by the time that letter of appeal was received by them, out of the blue in view of the previous week's events as I found them, that the claimant no longer wished to work for the respondent and the respondent considered that he had resigned. This further peculiar feature of an already unusual case did not, therefore, cause me to change my primary conclusions above, which are that the claimant did not establish that he was dismissed by the respondent for the purposes of s.95(1)(a).
95. It was clear from the evidence that the claimant no longer intended to be bound by his contract of employment after 22 January 2021. That was not the result of any act of dismissal by the respondent, but as a result of his own actions and the steps he took on 20 and 21 January 2021 to assert that he was redundant and to prepare a letter to the same effect in the name of the respondent. He regarded his employment at an end on that date and the respondent reluctantly accepted the position. Those circumstances did not amount to a dismissal for the purposes of s.95(1)(a).
96. I considered the other provisions of s.95(1) which exclusively define when a dismissal may occur for the purposes of an unfair dismissal claim.
97. S.95(1)(b) did not come into play because there was no fixed term contract here.
98. For the purposes of s.95(1)(c), the claimant did not seek to argue that he terminated his contract of employment and he expressly confirmed his position as being that he did **not** resign and that he was dismissed by the respondent.
99. Even if, despite that express indication by the claimant, the unusual events of this case could be construed as the claimant having terminated his own contract for the purposes of the first limb of s.95(1)(c), I find in any event that the second limb of s.95(1)(c) was not satisfied on the evidence I heard. In particular, the claimant would need to have asserted and proven on the balance of probabilities that there existed "*circumstances in which he is entitled to terminate [his contract] without notice by reason of the employer's conduct*". On the facts of the case as I have found them, there was no fundamental breach of the claimant's contract of employment by the respondent. There was therefore no dismissal for the purposes of s.95(1)(c).

100. In summary, it was not in doubt that both parties subsequently treated the claimant's employment as being at an end with effect from 22 January 2021, but the claimant did not prove, as he was required to do in order to pursue a claim for unfair dismissal in these proceedings, that the termination of his employment was by virtue of a dismissal by the respondent within the meaning of s.95. The claimant's claim for unfair dismissal therefore fail and is dismissed.

Employment Judge Cuthbert
Date 12 January 2022

Judgment & reasons sent to parties: 18 January 2022

FOR THE TRIBUNAL OFFICE