



EMPLOYMENT TRIBUNALS

Claimant:

Mr M McDonagh

v

Respondent:

T Fowles Haulage Limited

Heard at:

Reading

On: 3 September 2021

Before:

Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr A Griffiths (counsel)

RESERVED JUDGMENT

The tribunal's decision is that:

1. Mr McDonagh was not dismissed. He is still employed by T Fowles Haulage Limited.
2. As he was not dismissed, Mr McDonagh's complaints of unfair dismissal and for breach of contract in respect of notice cannot succeed.
3. The claim fails and is dismissed.

REASONS

Mr McDonagh's claim

1. Mr McDonagh started working as a driver for T Fowles Haulage Limited in July 2015. I will call the employer 'Fowles Haulage' or 'the company'. Mr McDonagh says he was dismissed by the company on 9 March 2020. Fowles Haulage do not agree. They say Mr McDonagh is still employed by them.
2. Mr McDonagh brought a claim against Fowles Haulage. He had solicitors helping him with his claim at that time. He says he has been unfairly dismissed and dismissed without being given his full notice. He contacted Acas for early conciliation on 2 April 2020. He received an early conciliation certificate on 17 April 2020.

3. Mr McDonagh's solicitors submitted his claim for him on 29 May 2020. When they filled in the form, they got the number of the Acas certificate slightly wrong. They put the last two digits the wrong way round. The claim was rejected because of the mistake¹. Mr McDonagh's solicitors did not know about their mistake until the tribunal told them on 10 July 2020. When found out, they immediately submitted another claim, on 10 July 2020. By this time the claim was 17 days late.
4. I decided that Mr McDonagh's claim should be allowed to go ahead even though it was late. Mr McDonagh and his solicitors thought they had got everything right. It was not reasonably practicable for them to submit the claim in time because they thought they had already done it. As soon as they knew there was a problem, they submitted another claim immediately. They did that within a further period which I consider reasonable.²
5. Fowles Haulage sent a response to Mr McDonagh's claim on 3 September 2020. Fowles Haulage say that Mr McDonagh's claim should not succeed because he has not been dismissed.

Preparations for the hearing

6. Before the hearing, the tribunal sent Mr McDonagh and Fowles Haulage a timetable called 'Case Management Orders'. The timetable explained what Mr McDonagh and Fowles Haulage needed to do to prepare for the hearing, and when they needed to do it.
7. The timetable said that Mr McDonagh and Fowles Haulage should send each other any documents they wanted to refer to at the hearing by 28 December 2020.
8. The timetable also said that Fowles Haulage should put all the documents into a file and send a copy of the file to Mr McDonagh by 11 January 2021. Fowles Haulage's solicitors made a file of documents and sent it to Mr McDonagh. It had 64 pages.
9. The timetable also said that Mr McDonagh and Fowles Haulage should prepare written witness statements with everything they wanted to tell the tribunal. Fowles Haulage's witnesses Mr Fowles and Ms McIntyre made written witness statements. Mr McDonagh did not make a written witness statement.
10. The hearing to decide Mr McDonagh's claim was due to be on 1 February 2021 by video. On 15 and 28 January 2021 Mr McDonagh asked for the hearing date to be put back. His solicitors were no longer helping him with

¹ A new rule about this sort of mistake was added to the Employment Tribunal Rules of Procedure 2013. The new rule (rule 12(2ZA)) came in on 8 October 2020. That was after Mr McDonagh's claims were submitted. The new rule allows a judge to decide to accept a claim even if there is a mistake with the Acas certificate number. The new rule is there so that small mistakes like this do not have to lead to an unfair outcome.

² I allowed the claim to go ahead under section 111(2)(b) of the Employment Rights Act 1996 and paragraph 7(c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

his claim. He was unable to attend the 1 February hearing because of the problems with his solicitors and he had no equipment for the video hearing. The date was changed to 3 September 2021. Everyone was told they could choose whether to come to the employment tribunal or join the hearing by video.

Hearing, documents and witnesses

11. At the hearing on 3 September 2021, I was at the employment tribunal. Mr McDonagh was also at the employment tribunal. The company's representative and witnesses joined the hearing by video.
12. I told everyone I would avoid using complicated legal words during the hearing, and I asked Mr Griffiths to do the same.
13. The file of documents which Fowles Haulage had prepared was used at the hearing. Mr McDonagh did not bring his copy to the hearing. The tribunal gave him a spare copy. Mr McDonagh has dyslexia. I asked everyone to read out the parts of the documents they wanted to refer to so that Mr McDonagh could listen. Mr McDonagh found it helpful to have the page open while people did that. I helped Mr McDonagh to find the right pages.
14. At the start of the hearing, the company's representative Mr Griffiths asked me to decide that the claim should not be allowed to go ahead. He said it should be 'struck out' (which means stopped). He said it should not go ahead because Mr McDonagh had not made a written witness statement, as the tribunal's timetable for preparations said he should.
15. I decided that the claim should be allowed to go ahead. I explained at the hearing why I had decided this. It was mainly because Mr McDonagh's solicitors had stopped helping him before his witness statement was ready, and it was difficult for him to prepare a witness statement on his own. I decided that Mr McDonagh could use his claim form instead of a witness statement.
16. Also at the start of the hearing, Mr McDonagh said that he had some text messages and recordings that he wanted refer to in the hearing. The text messages had not been sent to the company's solicitors. They were not in the file of documents.
17. The recordings had not been sent to the company's solicitors. They were not in the file of documents. Recordings of two calls had been sent by Mr McDonagh's solicitors to the company's solicitors before the file of documents was put together. Transcripts of these two calls (that is, written versions of what was said in the recordings) were in the file of documents. Before the hearing, the company's solicitors asked Mr McDonagh to send them any other recordings he had. Mr McDonagh did not send any more. At the hearing, Mr McDonagh said he had more recordings and he asked to play them.

18. I thought carefully about what was the fairest way to deal with this. I decided that it would not be fair to allow Mr McDonagh to refer to the text messages and the additional recordings. I explained why I had decided this. The texts and recordings had not been sent to Fowles Haulage as required by the tribunal's timetable. We had no printed copies of the texts or transcripts of the recordings. Fowles Haulage had not had time before the hearing to consider the texts or listen to the recordings. We may not have enough time at the hearing to listen to the recordings, or the right equipment to be able to hear them properly. We would have to reschedule the hearing if Mr McDonagh was allowed to refer to the texts and play the recordings. This would cause a long delay which would not be fair, especially when the hearing had already been rescheduled from February 2021. I decided the hearing should go ahead without the text messages and the additional recordings.
19. At the hearing Mr McDonagh answered questions from Mr Griffiths. The company's witnesses Mr Fowles and Ms McIntyre answered some short questions from Mr Griffiths and then answered questions from Mr McDonagh. After that Mr Griffiths and Mr McDonagh made closing comments.
20. There was not enough time at the hearing on 3 September 2021 for me to make my decision and explain it to everyone. I said I would send a written decision instead. I am sorry that there has been a delay in sending my decision. This is because I was unwell and away from work for a few weeks.
21. After the hearing had finished but before I had sent my written decision, Mr McDonagh emailed the tribunal on 29 October 2021. He enclosed some bank statements. Mr McDonagh said the bank statements showed that he was paid furlough pay by Fowles Haulage in August 2021 and September 2021 but not October 2021. On 6 December 2021 the tribunal sent the documents to the company's solicitors to comment if they wanted to, but they did not reply. Both Fowles Haulage and Mr McDonagh had agreed at the hearing in September that Fowles Haulage was still paying Mr McDonagh under the furlough scheme.

Points I have to decide

22. I have to decide whether Mr McDonagh was dismissed by Fowles Haulage.
23. If I decide that Mr McDonagh was dismissed, I have to go on to decide whether he was unfairly dismissed and whether he was dismissed without being given the right notice.

The facts

24. First I have to decide what happened (the facts). I do this by considering what the witnesses have said and by reading the documents I have been

shown. I then decide what I think is most likely to have happened. In this section I explain my decisions about what happened.

25. Fowles Haulage is a company which specialises in waste management. Mr McDonagh started working for Fowles Haulage as a driver in July 2015.
26. On 16 July 2019 and 11 December 2019 Mr McDonagh was given written warnings for taking leave without permission.
27. On 9 March 2020 Mr McDonagh did not attend work. Mr Fowles is the company's managing director. He tried to call Mr McDonagh to find out why he was not at work but he could not get through. Mr Fowles sent the claimant a text at 2.08am asking him to call him.
28. Mr McDonagh called Mr Fowles in the afternoon. Mr McDonagh and Mr Fowles spoke on the phone three times that day.
29. There was no transcript of the first call but Mr McDonagh and Mr Fowles mostly agree about what was said in that call. In the first call, Mr McDonagh said he was not in work because he was unwell. Mr Fowles said that Mr McDonagh should have called earlier in the day to tell him that he was not well enough to come into work. Mr Fowles said that Mr McDonagh had two previous warnings and the company would have to let him go. He said this in the heat of the moment, without knowing Mr McDonagh's reasons and without giving it much thought.
30. Mr McDonagh begged Mr Fowles not to dismiss him. He asked him to consider paying him to the end of the month. Mr Fowles said he would have to speak to Ms McIntyre as she dealt with those things. Ms McIntyre is the company's general manager. She was on holiday at the time. Mr McDonagh understood that he had been dismissed in the first call.
31. Mr McDonagh called Mr Fowles two more times that day. There were transcripts of both the later calls in the file of documents. Mr McDonagh said (and I accept) that in these later calls he was pleading for his job.
32. In the second call, Mr McDonagh and Mr Fowles had the following discussions:
 - 32.1. Mr Fowles said that he would not be able to pay Mr McDonagh to the end of the month, but he would have a week's pay (page 49).
 - 32.2. Mr McDonagh explained to Mr Fowles why he was not able to call earlier in the day to say he could not come in (page 50).
 - 32.3. Mr McDonagh asked if he could come into the company's office to put in writing the reason why he was not able to call earlier. Mr Fowles agreed (page 51).
 - 32.4. Mr McDonagh said he didn't think Mr Fowles had an answer and that every time he talked to Mr Fowles, Mr Fowles was probably speaking to somebody else. Mr Fowles said, '...like I say, I still need to discuss it and then get back to you' (pages 51 to 52).

- 32.5. Mr McDonagh asked why Mr Fowles had to speak to Ms McIntyre. Mr Fowles said because it was more her department (page 52).
33. In the third call, Mr McDonagh again said he would like to come into the office and Mr Fowles agreed (page 56).
34. The third call ended with Mr McDonagh saying he had shown the company the reasons for his absences. Mr Fowles replied that Mr McDonagh should send those letters in and said he would get a letter for Mr McDonagh sorted as well. He ended saying 'We'll go from there'. That was how things were left on the day.
35. Mr Fowles did not write to Mr McDonagh to confirm what they had discussed on 9 March 2020.
36. On 23 March 2020 Ms McIntyre returned to work after her holiday. That was the day the government announced the first national lockdown for Covid-19. Ms McIntyre called Mr McDonagh on 26 or 27 March 2020. They agreed that once the lockdown was over Mr McDonagh would come into the office for a meeting to try and resolve the situation of him taking days off without permission.
37. On 31 March 2020 the company sent a letter to Mr McDonagh to say that he would be on furlough leave under the Coronavirus Job Retention Scheme. Other staff were put on furlough at the same time. Mr McDonagh was on furlough from 1 April 2020 to 30 September 2021 when the scheme ended. He was paid by the company during this time.
38. Mr McDonagh and Ms McIntyre were not in touch again about the meeting until later in 2020. When Ms McIntyre called Mr McDonagh he said his solicitors would call her back. They did not call her back, and the meeting did not happen.
39. Mr McDonagh said that he was dismissed on 9 March 2020. He thought that he was not entitled to receive furlough pay. He did not contact Mr Fowles or Ms McIntyre directly about it, but he kept the furlough pay in a separate account and did not spend it, even when he was in serious financial difficulties.
40. I have to decide what Mr Fowles was saying when he spoke to Mr McDonagh in the calls on 9 March 2020. This is quite difficult because what he was saying in the three conversations was not always clear. I have considered this very carefully.
41. I have decided that Mr Fowles used words of dismissal in the first call when he said the company would have to let him go. Mr Fowles agreed that in the first call he used words from which Mr McDonagh reasonably understood that he had been dismissed. That is consistent with (in other words it fits with) the second and third calls where Mr Fowles and Mr McDonagh both refer to Mr McDonagh having been dismissed.

42. But I have decided, looking at what was said in the second and third calls, that by the end of the three calls things had changed. Mr McDonagh had pleaded for his job. He was asking Mr Fowles to change his mind. They both agreed that they would take more steps. The steps they agreed fit much better with Mr McDonagh continuing to be an employee, rather than with him still being dismissed. They had agreed:
- 42.1. that Mr McDonagh would provide more information about the reasons for his absences;
 - 42.2. that Mr Fowles would discuss it with Ms McIntyre and get back to Mr McDonagh; and
 - 42.3. that Mr McDonagh would come to a meeting in the office.
43. One possibility is that Mr Fowles was saying that these steps would be as an appeal for Mr McDonagh. I do not think he was saying that. He did not use the word appeal or anything like it. Mr Fowles was saying that he needed to speak to Ms McIntyre to decide what to do. As Mr McDonagh said, on 9 March 2020 Mr Fowles did not have 'an answer'.
44. For these reasons, I have decided that after using words of dismissal in the first call on 9 March 2020, in the later calls Mr Fowles decided that he should not dismiss him. He was persuaded by Mr McDonagh. He accepted what Mr McDonagh was saying. He took back the words of dismissal. He did not say this as clearly as he could have done. But it is clear that he had done this from what he said to Mr McDonagh and from what they agreed should happen next. Both Mr Fowles and Mr McDonagh intended and understood that there needed to be more information and more discussion about what was going to happen. They would 'go from there'.
45. Mr Fowles taking back the words of dismissal fits with what was said overall on the day. It also fits with what happened after 9 March 2020. Fowles Haulage treated Mr McDonagh as an employee, not as someone they had dismissed. The company continued to pay Mr McDonagh and were still paying him at the time of the hearing. They agreed to a meeting and Ms McIntyre tried to follow this up. Because of covid-19 and the national lockdown, the meeting never took place. This is a shame because it seems to me that not being able to meet up and discuss things quickly is what led to the dispute between them.

The law

46. In this section I explain what the law says about how the tribunal should decide whether someone has been dismissed.
47. Sometimes, it is not clear from the words used by an employer whether an employee has been dismissed or not. In this situation, the tribunal has to consider all the circumstances in which the words are said. If it is still not clear, the tribunal has to decide how a reasonable employee would have understood the words.

48. Another situation is where an employer clearly tells an employee that they are dismissed, but then changes their mind. In this situation, the employer can withdraw ('take back') the dismissal if the employee agrees.
49. In some special circumstances, an employer can take back words of dismissal, even if the employee does not agree. In this situation, the tribunal can investigate the circumstances in which the words of dismissal were said, to decide what was really intended and understood.
50. An example of this happened in a case called *Martin v Yeomen Aggregates Ltd*³. The employer angrily dismissed the employee. Five minutes later the employer changed his mind and told the employee that he was suspended for two days instead of being dismissed. The Employment Appeal Tribunal decided that the employee had not been dismissed. It said in special circumstances an employer should have the chance to take back words spoken in the heat of the moment. If words spoken in anger are immediately withdrawn, there is no dismissal.

Conclusions

51. Next, I consider how the law applies to what happened in this case and whether Mr McDonagh was dismissed. This section explains the conclusions I have made after doing that.
52. I have to decide whether Mr McDonagh was dismissed by Mr Fowles on 9 March 2020. I decided when considering what happened (the facts) that Mr Fowles used words of dismissal to Mr McDonagh in the first call on 9 March 2020 but he took them back in the later calls.
53. Looking at what the law says, I have decided that Mr Fowles was entitled to take back his words of dismissal. This is because:
 - 53.1. In the second and third calls, Mr McDonagh explained to Mr Fowles why he should not be dismissed. He said he was pleading with Mr Fowles for his job. This means that he wanted Mr Fowles to take back the words of dismissal. By the end of the calls Mr Fowles agreed with Mr McDonagh. They both agreed that the words of dismissal should be taken back. Mr Fowles was entitled to take back the words of dismissal with Mr McDonagh's agreement.
 - 53.2. Even if Mr McDonagh had not agreed to the words of dismissal being taken back, there were special circumstances. Mr Fowles said he would have to let Mr McDonagh go almost as soon as he spoke to him. He said that in the heat of the moment, without thought and without giving Mr McDonagh any chance to explain. These special circumstances mean I look at what was really intended and understood by Mr Fowles and Mr McDonagh. Once Mr McDonagh explained why he had not called earlier, Mr Fowles took back the

³ The case reference is 1983 ICR 314, EAT.

words of dismissal. This happened very quickly, later the same day. I have decided that both Mr Fowles and Mr McDonagh intended and understood that more information would be provided and that they would talk about this more. I have decided that by the end of the calls on 9 March 2020, both intended and understood that Mr McDonagh had not been dismissed.

54. My conclusions mean that there was no dismissal of Mr McDonagh on 9 March 2020. The words of dismissal in the first call were taken back with agreement so the dismissal was withdrawn. Another way of looking at it is that words of dismissal spoken in the heat of the moment were taken back so that overall there was no dismissal at all.
55. As Mr McDonagh was not dismissed, his claim for unfair dismissal and for notice pay cannot succeed. Those claims can only succeed if someone has been dismissed.
56. I add that as Mr McDonagh was not dismissed, he was entitled to the pay he received when on furlough from 1 April 2020 to 30 September 2021.
57. Finally, my conclusion also means that Mr McDonagh is still an employee of Fowles Haulage. I hope that Mr McDonagh and the company can discuss this and work out together what will happen next.

Employment Judge Hawksworth

Date: 27 January 2022

Sent to the parties on:

4 February 2022

For the Tribunals Office

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