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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102314/2020

Held in Glasgow on 24 and 25 August 2021

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**Employment Judge S Walker
Tribunal Member I Ashraf
Tribunal Member A Grant**

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Mr J Bolger

**Claimant
In person,**

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Pointmedia Creative Ltd

**Respondent
Represented by:
Mr Maxwell, solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is dismissed.

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REASONS

Introduction

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1. The claimant complained of unfair dismissal, breach of contract (in respect of notice pay) and disability discrimination.

2. At a Preliminary Hearing on 10 June 2021, the Tribunal had found that the claimant was a disabled person for the purposes of the Equality Act 2021 at the relevant time. The Tribunal found that the disability was a mental impairment with symptoms of anxiety, low mood and paranoia.
- 5 3. At the start of the hearing, the respondent made an application to amend its response. Having heard submissions from the parties, the Tribunal decided to refuse the application for reason given at the time.
4. Mr Bolger gave evidence on his own behalf. Mr Murray and Mr Winter gave evidence for the resident. A joint bundle of documents was lodged and both
10 parties made submissions.

Issues

5. There was an agreed list of issues to be determined at this hearing. In relation to the merits of the claim, these were as follows:

Unfair dismissal

- 15 6. Did the claimant resign or was he dismissed?
7. If the claimant resigned did the circumstances giving rise to the resignation amount to a constructive dismissal?
8. Was the claimant's employment terminated by mutual consent?
9. If dismissed, was the dismissal for a potential fair reason, namely the
20 claimant's conduct or some other substantial reason?
10. Did the respondent follow a fair process?
11. Was it reasonable for the respondent to treat the claimant's conduct (or some other reason) as a fair reason to dismiss?

Direct discrimination

12. What acts are complained of as direct discrimination under section 13 of the Equality Act?

13. In respect of each act, did the respondent treat the claimant less favourable because of his disability than it treated or would treat others?

14. Was the claimant subjected to direct disability discrimination contrary to section 13 of the Equality Act 2010 on account of the treatment he received from the respondent and the circumstances leading to the termination of his employment?

Findings in fact

15. The following relevant facts are found to be proved

16. The respondent operates a printing business. It was set up by Mr Murray who is the sole director. Mr Winter joined as a consultant in 2012, having left a different printing business. The claimant was employed at that other business.

17. When the claimant was made redundant from the other business, he contacted Mr Winter and he was given a job with the respondent in August 2012.

18. The claimant worked closely with Mr Winter and took over from him as Production Manager in 2016. He was employed in that role when his employment came to an end on 3 February 2020.

19. During his employment with the respondent the claimant had a good working relationship with both Mr Murray and Mr Winter who considered him to be very good at his job. There was also a close personal relationship, almost a family relationship, particularly between the claimant and Mr Winter.

Financial and other support

20. The claimant had some financial issues over the years he was employed by the respondent and the respondent provided support by an employee loan. At first these were relatively small amounts, about £1,000 a year, that were paid
5 back from the claimant's wages.
21. In 2016/17 the amounts borrowed started to increase to about £5,000 a year.
22. Mr Murray and Mr Winter wanted to help the claimant and his family. They offered to provide a deposit to allow him to move his family to Bishopbriggs near his place of work where there were good schools for his children. That
10 ultimately did not work out but the respondent provided him with a deposit for a property in Glasgow to rent. The respondent also gave him a loan of £4,000 to help with a credit card bill and support with lawyers' fees.
23. When the claimant and his wife needed a family car, their credit rating was poor. Mr Winter agreed to take the car in his name and for the claimant to pay
15 him back over 5-6 years. The claimant made the relevant payments until November 2019 when he told Mr Winter he was struggling to make the payments. Mr Winter agreed he could leave it until he was back on track.
24. In 2019, the claimant and his wife separated. This was very acrimonious and the claimant found this very difficult. The respondent gave the claimant a loan
20 of £2,500 to get a Mini to get to work. Although this was by way of a loan, Mr Murray gave the claimant a bonus every week to pay it off.
25. Mr Murray also gave the claimant £1,300 so he could get a mobility car for his mother.
26. The claimant was also given 9 days of time off with pay to attend meetings
25 with lawyers in connection with his divorce.
27. Mr Murray was concerned that the claimant's debts were spiralling. He asked to meet the claimant in a cafe on the day he was due to return from absence

on 20 November 2020. Mr Murray told him to bring a list of all his debts and they would try and work out a way to pay these off.

28. Following the meeting, Mr Murray produced a schedule and said the claimant needed to get rid of the cars he was paying for. He said he would take the Mini back. However this did not happen.
29. In December. Mr Winter gave him some money to see him through Christmas.
30. When the claimant returned from a period of absence in January, he asked for £300 which Mr Murray gave him. On 26 January, he asked for another £300. Mr Murray gave it to him but said that was it, he was not prepared to lend any more money. Mr Murray felt the borrowing was out of hand.
31. In total, the respondent provided the claimant with staff loans totalling over £25000 over his employment of which he has repaid about £17,500. Mr Winter and Mr Murray also provided personal financial support.

Absence

32. The claimant's attendance was historically good until he separated from his wife. The respondent did not insist on fit notes for absence. He was absent on 3 and 4 November saying he had stomach problems. His absence then continued and a fit note was provided which gave the reason for absence as "stress". This was the only fit note received by the respondent during the claimant's employment. He was signed off until 20 November 2020. Following his meeting with Mr Murray, he did not return until 25 November.
33. The claimant did not return to work on 6 January 2020 after the Christmas shutdown as he had "flu". He was absent for 9 days.
34. The claimant had been seeing his doctor at this time and was, in fact, suffering from depression and anxiety. He was on medication to help him sleep. Mr Murray and Mr Winter were aware that the claimant was struggling because of his personal issues, including the breakup of his marriage, difficulties with access to his children and his financial problems. However,

neither Mr Murray nor Mr Winter were aware that these struggles amounted to a mental health condition of anxiety and depression. They were not aware he was on medication.

Events on 3 February 2020

5 35. The claimant was regularly late for work at this time. This was due to him taking medication although as noted above, neither Mr Winter nor Mr Murray were aware of that. This caused problems as he had to speak to the night shift before they left and schedule work for the day shift. When he was late Mr Winter had to step in and take over to keep thing moving.

10 36. On 3 February, the claimant was late. Mr Winter sent him a text to ask if he was OK? When the claimant arrived, Mr Winter said his timekeeping would need to improve and he was akin to the captain of the team. He needed to lead by example. The claimant said he need to be fair to Mr Winter and Mr Murray and he wanted to meet them to have a discussion. Mr Winter said to
15 speak to Mr Murray.

37. The claimant went to see Mr Murray and said he was resigning. Mr Murray asked if he was sure and suggested they have a meeting to discuss it.

38. It was arranged that they would meet at Mr Murray's house. Mr Murray, Mr Winter and the claimant all drove there in separate cars. Mr Winter was last
20 to arrive.

39. The claimant had already told Mr Murray he wished to resign and Mr Murray tried to dissuade him. When Mr Winter arrived, Mr Murray told him the claimant was going to resign. Mr Winter did not wish the claimant to leave. He said to the claimant that this was not the solution. He had a well-paid job and
25 running away would not solve anything. The claimant said he had a lot of things to sort out in his life . Mr Winter said that it was drastic to walk away from his job. The claimant said he was "100%. He needed to sort it out." The discussion took between 30 minute and an hour,

40. Mr Murray said that he would formalise the resignation with the claimant and
30 Mr Winter then headed back to the office to take over the claimant's role having hugged the claimant in an emotional good bye. Mr Murray then asked

the claimant to write out his resignation which he did. The claimant then left and did not return to the respondent's premises.

41. Following this meeting, on 3 February, there was an exchange of texts between the claimant and Mr Winter. Mr Winter said "*I'm absolutely gutted mate., over the last few months I thought that we'd be able to get you through your issues and I never thought it would come to this*". He also said "*It's a big loss for us and we'll soldier on but Point media has lost one of the good guys., gutted mate.choking back the tears as I'm typing this*"

42. The claimant responded "*I'm honestly gutted too mate I've broke my heart since I left Graeme's house. You have ben like a father figure to me dave and I'll be forever grateful for that mate. I'll get back into it whether its with Pointmedia or not because to be honest it's all I've ever known mate. I love all you guys in there you more than most but I'll get back to myself in the next month or two I know I will dave. I'll keep in touch though. You and Graeme have been nothing but supportive of me.x*"

43. The claimant and Mr Winter continued to exchange texts over the next few weeks. The claimant did not indicate at any time that he had felt forced to resign or that he wanted to return or that he was on some kind of break.

New management information system

44. The respondent through 2019 had been putting in place a new Management Information System. It had been implemented in the Estimating part of the business and was due to be implemented into Production by the end of January 2020. That date was put back because of the claimant's absence. When the claimant resigned, Mr Murray appointed another employee, Steven Chapman to progress the new system. Mr Murray and Mr Chapman spoke to the suppliers and the date for implementation was put back again to the end of March 2020. There was a cost to the respondent with each delay. Implementing this system was the primary focus of the business in February 2020.

45. On 25 February 2020, the claimant emailed Mr Winter and Mr Murray to say "**7 am writing to cancel my previous resignation letter that I copied form*"

5 *Graeme at the house*". He said that *"following a conversation with my doctor and citizen advise what I done the was wrong and completely uncharacteristic of me due to not being in a mental state to do that"*. He said he was struggling and asked to come in on Friday to discuss. Neither Mr Winter nor Mr Murray replied to that letter. They were focussed on the implementation of the new system.

46. There were texts between the claimant and Mr Winter on 26 and 28 February 2020. The claimant was asking if his salary could be paid early. Mr Winter said he would ask Mr Murray about it.

10 47. Mr Winter spoke to the claimant on the phone about this time. He said that the claimant could not come back in the middle of the implementation of the Production system, that *"that ship has sailed"*. However he was concerned that the claimant was in trouble financially and he said he would give him what he could. He met the claimant in Tesco's car park on 3 March and gave him
15 what he had in his personal (as opposed to joint account). This was about £1,500.

48. There were more texts between the claimant and Mr Winter. On 4 March, the claimant mentioned going for another job and he was upset that Mr Murray has told the potential employer that the claimant owed them money.

20 49. On 11 March 2020, the claimant sent a text to Mr Winter that caused him concern. The claimant wrote *" Listen mate no going to lie but I'm in a bit of trouble, I've been ducking and diving since way before Xmas. Because of financial strain I was more or less tapping Peter to pay Paul and its caught up dave. I know its not your problem mate but any chance you could see Graeme
25 to pay the last of my salary early. I need to get this guy off my tail Dave I'm at my wits end mate and don't know where to turn I'm constantly looking over my shoulder. I should've been honest with you ages ago but I was generally embarrassed of how bad it's got mate"*

50. Mr Winter was concerned as this confirmed his suspicion that the claimant was in serious financial trouble. Mr Murray agreed to pay the claimant the final months' salary early.

51. The claimant then, on 15 March said he was willing to take a pay cut of £10000 to come back. He said, '*7 can't walk away with absolutely fuck all*'. He said he was now being treated for his mental health and was ready to work again. He also said he thought his notice was 3 months and he had only been paid one. (It should be noted here that there was not obligation on the respondent to pay any notice and this was done as a goodwill gesture.)

52. When lockdown was happening towards the end of March 2020, the claimant kept messaging Mr Winter about money. This was causing Mr Winter a great deal of stress. On 26 March 2020, he emailed the claimant to say he didn't have any answers and referred to the personal loan he had given the claimant and the business loan. He said there was no more he could do. He has not seen the claimant since.

Relevant law and submissions

53. Mr Maxwell helpfully set out the law in this area and also how he said it should be applied in this case in his detailed submissions. These have not been set out here in detail here, simply because the law is not in dispute and because the case revolved around the disputed facts.

Discussion and decision

Unfair dismissal

54. The key issue in the case was how the claimant's contract came to an end and the circumstances in which he came to write a letter of resignation at Mr Murray's house on 3 February 2020.

55. Mr Murray and Mr Winter gave clear evidence that the suggestion of a meeting came from the claimant and Mr Murray gave clear evidence that when claimant arrived at work that day he said he was resigning. The claimant says it was Mr Murray who instigated the meeting.

5 56. There is then a dispute about what happened at the meeting. Mr Murray and Mr Winter gave clear evidence that the claimant said he was going to resign and that they tried to talk him out of it. The claimant says that he was forced to resign under duress. He said that he had felt intimidated and that Mr Murray wrote out the letter of resignation and forced him to copy it. He also said that
10 he had been told he could return to his job when he was able to.

57. The Tribunal has unanimously and without hesitation accepted the evidence of Mr Murray and Mr Winter. The Tribunal found Mr Murray and Mr Winter to be credible witnesses who gave clear and consistent accounts of the meeting. They also gave detailed evidence of their extensive financial and emotional
15 support for the claimant over a long period. The Tribunal found Mr Winter a particularly persuasive witness who described his close relationship with the claimant over the years and his distress at how events had unfolded and his concern for the claimant was evident. Mr Winter became tearful while giving evidence to the Tribunal.

20 58. Mr Murray and Mr Winter's accounts are also supported by the tone of the text messages between the claimant and Mr Winter on the day of the claimant's resignation and in the weeks after it. There was no suggestion in these exchanges that the claimant had felt intimidated or forced to resign or that he believed he was on some kind of break and could return at any time.
25 On the contrary, the exchanges show a clear and supportive relationship between the claimant and Mr Winter. There is also reference to the claimant looking for another job which does not suggest he considered that he was on a break before returning to his old job. Even when he asks to withdraw his resignation, he does not suggest that he was forced into it nor that there was
30 an agreement that he could simply return when he wanted to.

59. The respondent's account was also simply more plausible in light of the historic support both Mr Murray and Mr Winter had given to the claimant and the close relationship that they had, particularly the claimant and Mr Winter. The claimant had been provided with substantial financial support over the 8 years he was employed both from the respondent company by way of loans but also from Mr Murray and Mr Winter individually. This continued after the claimant's resignation with Mr Winter, in particular, trying to help the claimant by paying him notice (to which he was not entitled) , having that paid early and also giving him £1,500.
60. The Tribunal did not accept that the claimant would have felt intimidated. On the contrary there appeared to a hug between the claimant and Mr Winter. The text messages do not support a suggestion that the claimant was intimidated by Mr Murray or Mr Winter. If the claimant had felt intimidated it is clear he could have asked Mr Winter for support and that would have been provided.
61. There were some features of the respondent's account, as pointed out by the claimant, which the Tribunal accepts do require an explanation. Why did the meeting take place away from the office? Why did the letter of resignation have to be written immediately? Why would the claimant have resigned when he was in financial difficulties?
62. The Tribunal accepted the account of Mr Murray and Mr Winter that they did not want the conversation to be overheard as they did not know what the claimant was going to say. The Tribunal also considered it relevant that a previous meeting between Mr Murray and the claimant to discuss his personal finances took place in a cafe and not at the office.
63. The Tribunal also accepted Mr Murray's evidence that he insisted on written resignations in every case. The Tribunal also considered it was likely that the decision having been made, Mr Murray wanted to tie up the loose ends and get back to the business. This was a critical time for the business and, if the claimant was resigning, best to have a clean break and move forward.

64. The Tribunal has struggled with an explanation for why the claimant, in a difficult financial position and with a supportive employer, would have chosen to resign. It does not make sense. It did not seem to make sense to Mr Murray or Mr Winter.

5 65. The Tribunal considers it was possible that, because of his state of mind around that time, that the claimant simply does not remember what was said. This would also explain why he took the decision to resign when that made no sense at a time when he was having severe financial difficulties. It may also be that, as Mr Winter suggested, he was in real financial trouble and people were coming after him and he didn't want to involve Mr Murray and Mr Winter. However, the Tribunal does not have to reach a firm conclusion on that. It is for the claimant to prove that he was dismissed, notwithstanding he signed a letter of resignation. The Tribunal considers he has not discharged that burden of proof.

15 66. The Tribunal has accepted that the claimant instigated the meeting and resigned voluntarily, there was no intimidation or duress and there was no agreement that he could return when he felt better. There was no obligation on the respondent to re-employ him when he requested it.

20 67. The claimant has therefore not been dismissed and there is no need to consider the complaint of unfair dismissal further. That complaint is dismissed.

Direct discrimination

25 68. It was clarified at an early stage in proceedings, at a time when the claimant was legally represented, that the claim in respect of disability discrimination under the Equality Act 2010 was one of direct discrimination only. Section S13 defines this as less favourable treatment because of a protected characteristic, in the current case, this is said to be disability.

69. It is not necessary that the discrimination was consciously motivated by disability and disability need not be the sole cause provided it was an

“important or significant cause” of the less favourable treatment. This is regardless of motive or intention.

5 70. It seems that the alleged discriminatory acts relate to the alleged resignation under duress (the “dismissal”) and also the respondent’s inaction in not permitting the claimant to withdraw his resignation.

71. The Tribunal has found that it was the claimant who instigated the meeting on 3 February and that he resigned voluntarily. There was no dismissal, whether discriminatory or otherwise.

10 72. As far as not allowing the claimant to withdraw his resignation is concerned, there was simply no evidence from which the Tribunal could conclude that someone who was not disabled would have been treated differently, let alone more favourably.

15 73. In these circumstances, the burden of proof does not shift to the respondent and they do not need to prove that they did not discriminate. However, in any event, the Tribunal were satisfied that the account given by the respondent’s witnesses was genuine. The claimant had left the business when it was at a critical point in relation to a new process and the business had readjusted to his absence. Mr Winter, Mr Murray and the reorganised team were focussed on the implementation of the new system and it would have been very
20 disruptive to readjust again to accommodate the claimant, especially at this critical point.

74. The claim of direct disability discrimination is dismissed.

Conclusion

25 75. The Tribunal has found this a troubling case. It remains unclear why the claimant acted as he did and gave up a well paid job in which he was supported at a time when he was in financial difficulties.

76. The Tribunal also notes that Mr Murray indicated that the respondent would change the way it treats its employees from now on. That is obviously a matter

for the respondent. However the Tribunal wishes to record that having heard the evidence, the respondent appears to have been an extremely caring and supportive employer to the claimant and to others and considers that it would be a pity if this unusual case changed that culture.

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Employment Judge: Susan Walker
Date of Judgment: 07 September 2021
Entered in register: 09 September 2021
and copied to parties

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