F769/172

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103486/2018

Hearing Held at Glasgow on 27 and 28 September, and 22 October, 2018

Employment Judge: Mr A Kemp (sitting alone)

Mr Scott Lindsay	**Claimant** **In person**
Alderforce SC Limited	**Respondents** **Represented by:** **Mr S Hughes** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant was dismissed by the Respondents, that dismissal was unfair, the Respondents were in breach of contract, the Claimant had accrued entitlement to pay for annual leave, and the Claimant is awarded the following sums:

(i) Three Hundred and Fifty Three Pounds and Thirty Nine Pence (£353.39) in respect of the basic award for unfair dismissal, reduced by 30% for the Claimant's contribution;

(ii) One Thousand and Nine Pounds and Sixty Eight Pence (£1,009.68) in respect of damages for breach of contract, payable by the Respondents to the Claimant under statutory deductions; and

(iii) One Hundred Pounds and Ninety Six Pence (£100.96) in respect of two day's accrued but unpaid annual leave, payable by the Respondents to the Claimant under statutory deductions

REASONS

Introduction

1. The Claimant made a claim of unfair dismissal against the Respondents, together with a claim for damages for breach of contract in respect of there being no notice, and for outstanding holiday pay. The Claim was defended on each element by the Respondents, who alleged that there had been no dismissal, or breach of contract, and that no holiday pay was due.

Issues

2. The Tribunal identified the following issues:

   (i) Had the Respondents dismissed the Claimant under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?

   (ii) If so, what was the reason for that dismissal?

   (iii) If the reason was potentially fair, was that dismissal unfair under section 98(4) of the Act?

   (iv) Had the Claimant contributed to the dismissal?

   (v) Were the Respondents in breach of contract?

   (vi) What was the extent of the Claimant's losses?

   (vii) Did the Claimant have any outstanding holiday pay entitlement and if so to what?

Evidence

3. The Tribunal heard from the Claimant, and from Mrs Adele Ward and Mr Mark Friel of the Respondents. Documents were spoken to from a single bundle Mr Hughes, who had been instructed the day before, produced at the start of the hearing. Neither party had complied with the Orders previously made. Documents were added to the bundle during the course of the hearing. In addition, the Claimant produced during the course of his evidence in chief an email which had attached to it a sound file from a recording he had taken of

his conversation with Mrs Ward, referred to below. He explained that he had not produced it before as the Citizens Advice Bureau had told him that he could not do so as he had recorded it secretly. It was listened to and was a very short clip. He then produced a second more full audio recording of that same conversation. Initially Mr Hughes did not object to the production of that evidence, but latterly having listened to the recording he did so, as set out below.

4. Mr Hughes sought additional time to make a submission on the issues in relation to whether or not there had been a dismissal after the evidence had been heard on the second day of the hearing, and that was not opposed. The third day was taken with those submissions.

5. In addition the Claimant produced for the third day a proposed transcript of the audio recording, which he spoke to in additional evidence. I comment on that further below.

Facts

6. The Tribunal found the following facts to have been established:

7. The Claimant is Mr Scott Lindsay.

8. The Respondents are Alderforce SC Limited. They are a business which operates franchises for some of the Kentucky Fried Chicken outlets in the UK, which sell fast food.

9. The Claimant was employed by the Respondents' predecessor as a Team Member with effect from 4 December 2013, working at the outlet in East Kilbride. When working as a Team Member he wore a red shirt to denote that. He was paid on an hourly basis. The hours varied but were part-time hours, and at or about 8 per week. He was 16 years of age when he commenced working for the Respondents' predecessor.

10. The Claimant received a document entitled Statement of Mains Terms of Employment from KFC (GB) Ltd in respect of that employment ("the Statement"), which had transferred to the Respondents following a relevant transfer under the Transfer of Undertakings (Protection from Employment) Regulations 2006, the date of which transfer was not given in evidence. The material terms of the Statement for the purposes of this case were:

"Job Title

You are employed as a Team Member. The Company reserves the right to require you to perform other duties from time to time, and it is a condition of your employment that you are prepared to do this.

Place of Work

Your normal place of work is East Kilbride. The Company reserves the right to transfer you to another location/place of work, or alternatively work of a suitable nature, on either a temporary permanent basis as the Company may from time to time require, and according to the requirements of the business .....

Rate of Pay

Your basic hourly rate will be £4.00 per hour .....

Hours of Work

A) You are required to work 8 hours per week.

B) The Company reserves the right to vary your normal hours if necessary to meet the Company's business needs. These may include, but are not limited to, seasonal variances in trade, external economic factors and influences of third parties and other exceptional circumstances beyond the Company's control.

Holiday Entitlement

Your annual holiday entitlement is 5.6 weeks per annum (28 days full-time equivalent) in the complete holiday year .....The Company's holiday year runs from 1 October to 30 September each year.

Disciplinary Procedure

During your employment you must maintain the standards of performance and behaviour required of you by the Company and carry out your duties according to the Company rules and regulations. The Company's non-contractual disciplinary procedure is designed to make sure that you keep to these standards and that any breaches of these standards are dealt with fairly."

Notice

..... After the successful completion of your probationary period you are required to give the Company and entitled to receive the following periods of notice to terminate your employment:

Over four weeks but under two years' continuous service - one week

Over two years' continuous service - one week for each complete year of service to a maximum of 12 weeks after 12 years...."

11. The Statement was signed by the Claimant, and someone on behalf of the then employer, whose identity was not given in evidence, on 26 October 2013 but did not have any date provided in a clause regarding the commencement date, in which the date of commencement had been left blank. The document also stated:

"Any changes or amendments to the terms contained in this Statement, or the policies which form part of it, will be confirmed in writing by general notice within one moth of them occurring..."

12. The terms and conditions were varied thereafter. The rate of pay was periodically increased.

13. The Claimant was promoted to the role of Team Leader in September 201 7. That promotion was to the first level of management. When working as a Team Leader he wore a black shirt to denote that. He was paid on an hourly basis. The hours varied but were full-time hours, generally approximately 36 - 40 hours per week, worked five days per week. The pay was higher than as Team Member, and latterly was £6.50 per hour.

14. The Claimant did not receive any written amendment to the Statement at any stage. By September 2017 the Claimant was employed on a contract as Team Leader, working variable hours on a full-time basis, five days per week. For a period of at least a year the Claimant had not worked 8 hours per week, but had worked an average of approximately 40 hours per week.

15. Shortly after the promotion to Team Leader the Claimant was transferred to work at the Respondent's outlet in Argyle Street, Glasgow. It is situated in the city centre and is a far busier outlet than that at East Kilbride. The Claimant remained a Team Leader, on the same hourly rate, working full time hours of on average about 40 hours per week, but on occasion working about 50 hours per week.

16. In the period for which payslips were produced to the Tribunal, the Claimants hours and gross pay were as follows:

Date	Hours	Gross Pay (£)
10 October 2017	87.93	571.57
24 October 2017	46.92	304.96
7 November 2017	67	435.50
21 November 201 7	86.75	562.88
5 December 2017	61.92	402.46
19 December 2017	69.9	454.35
2 January 2018	96.38	626.49
16 January 2018	65.42	425.21

30 January 2018	75.47	497.03
13 February 2018	52.28	339.62
13 February 2018	[5 days holidays]	247.45
27 February 2018	67.5	438.75

17. On 10 January 2018 a Letter of Concern was prepared by Mr Mark Friel, which was not a document under the Disciplinary Policy of the Respondents, but an informal letter designed to highlight concerns with his performance (p. 36). The letter outlined the issues involved, stated that it was not a part of the disciplinary procedure but "marks a point in time at which we have informed you that we require an immediate and sustained improvement in the areas we have discussed." The letter indicated that there would be a follow up meeting in two weeks' time.

18. Mrs Adele Ward was the Claimant's line manager, and her line manager was Mr Friel. Mr Friel had initially intended to meet the Claimant, but pressure of work meant that he asked Mrs Ward to do so.

19. She met the Claimant on 12 January 2018, and they discussed the letter. The Claimant did not accept some of the issues that were raised with him. Mrs Ward wrote out his position in relation to them on the back of the letter (p. 67) and then both she and he signed the letter of concern (p.66).

20. Mrs Ward wrote by email to Mr Friel and another manager of the Respondents on 12 January 2018 to report the meeting. It referred to him wishing to raise a grievance. She also stated that his "behaviours are working against my attempts at improvement [of morale]. There has been examples of insubordination .....I personally feel that in order to give Scott the fairest change to show commitment towards improvement it may be best to give him a new start in a store without these frustrations and one with a lower sales volume so that he can learn his role with ease."

21. No action was taken to progress the grievance, which the Claimant did not put in writing.

22. The Claimant and Mrs Ward did not have a good working relationship. The Claimant challenged her decisions, and was insubordinate towards her on occasion. She considered that he was not performing well in his role as Team Leader. She considered that he had not coped well with some difficult customers, including those who had been drinking heavily.

23. The outlet in Argyle Street in addition to being far busier than that in East Kilbride had materially longer opening hours and received far more customers who were affected by drink or drugs, or were otherwise difficult to manage. On one occasion, the date of which was not given, the Claimant had not dealt well with a customer who had been drinking, avoiding speaking to him, and Mrs Ward had required to intervene.

24. The Claimant's duties included completing checklists for health and safety issues such as temperatures of equipment at particular points in time. There were occasions when he did not complete those accurately.

25. There were further occasions when the Claimant was not on the premises at a time when he should have been, although he had been nearby.

26. There was no initial follow up meeting on or around 26 January 2018.

27. Mr Friel and Mrs Ward had a discussion shortly thereafter with regard to the Claimant. Mr Friel decided that his performance continued not to be sufficient, and decided that he should have additional training in order more properly to fulfil his role as Team Leader. In order to create the time for that, he intended that the Claimant's hours be reduced materially, to about 20 per week. He did not check the terms of the Claimant's statement of terms of employment however. In light of pressure of work he asked Mrs Ward to meet the Claimant to inform him of that.

28. No disciplinary process was commenced by the Respondents in relation to their assessment of his performance or behaviour.

29. On 17 February 2018 Mrs Ward telephoned the outlet and spoke to one of the staff, Martin Leary. She asked him then to pass the telephone to the Claimant so that she could speak to him. Initially the Claimant refused to take the telephone, and continued to smoke a cigarette. When he did take the telephone and speak to her, he was not listening properly to what she said, and was generally insubordinate towards her.

30. On 18 February 2018 the Claimant was at work, that being a Sunday. Initially he was outside having a cigarette with another Team Leader Victoria Rooney at about 12.30. The outlet was not open for custom at that point as there had been a power cut, but there was work to do to prepare for the opening of the store. Mrs Ward came across them and asked the Claimant if he had clocked in, in order to start work. He replied that he had not, as he was due to start at 1pm. She asked him to do so, and said that they would have a meeting.

31. The Claimant did so, and then met Mrs Ward in the premises. They were alone. They went upstairs for privacy.

32. In light of the poor relationship that the Claimant had with Mrs Ward, and his concerns as to his position, he sought to record the conversation using his mobile telephone, without informing her. She noticed however that he was making movements that might indicate that he was recording their conversation, and was aware of that possibility.

33. Initially Mrs Ward explained that there were concerns as to the Claimant's performance. He disputed that. He spoke to Mrs Ward in an insubordinate manner. The two of them had an argument over such performance issues, and how the Claimant had acted towards Mrs Ward including over the telephone call the previous day.

34. Mrs Ward then told the Claimant that his hours were to be reduced to "contracted hours", and that he would be wearing a red shirt, by which she meant that he would be a Team Member, not Team Leader. She did not specify any change in the hourly rate of pay. She gave him an option of deferring the start of that change for a week as hours had already been booked for the next week. Mrs Ward had not checked the Statement before having that conversation.

35. The Claimant believed that his hours were being reduced to 4 per week, those being the hours he thought were in his statement of main particulars of employment. In fact, the reference to contracted hours was to the 8 hours per week in the Statement referred to above, although neither Mrs Ward nor the Claimant were aware of that.

36. The Claimant reacted to that remark as to reduced hours by stating something to Mrs Ward to the effect "Take a fuck to yourself'.

37. Mrs Ward stated to him something to the effect "that's you out of a job now pal. Get your stuff and go".

38. The Claimant then got up, and started to leave the premises by walking down stairs. As he was about to leave the premises he spoke to Victoria Rooney, who had been downstairs, and said to her 'Tve been sent home, I'm leaving. I told her to go fuck herself'.

39. The Claimant and Mrs Friel exchanged text messages on the evening of 18 February 2018. The Claimant's message was:

> "I am requesting a written statement of my termination of employment. This must be completed in two weeks."

Mrs Ward replied:

> "You weren't terminated, you walked out remember?"

The Claimant replied

"A Okdokes then il b in for my shifts tomorrow then. When you told me not to bother coming back for anymore of my shifts and that was me done. Sounded like you sacked me."

Mrs Ward replied:

"No one said that. You were told that your hours would be dropped to contracted hours and you wouldn't be completed management delegation. I also gave you the option of working the hours for next week since they were already posted and if you didn't want to do that you could do the next 48 hours. That was all I got to before you told me to take a fuck to myself and walked out. As a result of your misconduct and aggressive language you will not be working in argyle st. If you require any further information or assistance please, as already instructed, contacted your area manager using the proper channels. This will be my final request to ask you to refrain from contacting me direct."

40. That evening the Claimant sent text messages to Mr Friel, which were not before the Tribunal, in which he referred to what he claimed was a dismissal.

41. The following day the Claimant sent an email to Mr Friel with part of the audio file of the recording he had taken on his mobile phone, which email included the following:

"Here is the evidence of me being dismissed."

42. Mr Friel spoke to Mrs Ward that same day, and replied to the Claimant's email of 19 February 2018 the same evening, stating that he had not been dismissed. In it he referred to the conversation the previous day and stated

"Mid way through this conversation and without hearing any solution you (ALLEGEDLY USED FOUL AND ABUSIVE LANGUAGE TO YOUR RGM)."

He stated that that would need to be fully investigated along with other allegations. It enquired about the Claimant returning to work.

43. The Claimant replied very shortly thereafter, the same evening, referring to the audio file he attached, and commenting

"Not sure if you heard the attached file.

"Just get your stuff and go that's you out of a job"

This key point of information is clear evidence of me being sacked...."

He stated that he had not resigned, and

"will not return to a workplace under a manager who has a clear disregard for staff members and has clearly misreported evidence to you....."

44. The Claimant did not return to work for the Respondents.

45. On 20 February 2018 the Claimant emailed Mr Friel twice seeking a statement of reasons for dismissal, and asking for a full investigation.

46. On 21 February 2018 Mr Friel replied to reiterate that he had not been dismissed, and suggested that the best course of action would be for him "to return to work as you have agreed - in KFC Renfield St". That was a reference to another outlet of KFC, situated close to Argyle Street in Glasgow City Centre.

47. Mrs Ward obtained statements from Victoria Rooney and Martin Leary, and sent those together with one for herself to Mr Friel on 21 February 2018 by email (p. 74).

48. The statement from Ms Rooney was signed by her and dated 20 February 2018. It stated the comment made by the Claimant to her as set out above.

49. The statement from Mrs Ward was produced latterly in evidence (p.93-95). It stated that Mrs Ward concluded that the Claimant was going to record the conversation that took place on 18 February 2018. In the description of the events, she made the following comment:

> "I continued to explain from what was discussed at his meeting with Mark he would be moving to contracted hours and completing only TM delegation for the meantime but I was cut off when he stood up, told me to "go and take a fuck to yourself' and proceeded to walk down the stairs. I tried explaining to him that he would end up out of a job with that attitude but he wasn't listening".

50. That same day the Claimant replied to state that he had clear evidence of being dismissed, that there was no need for an investigation and that he would be commencing action.

51. The Claimant thereafter commenced Early Conciliation, then made the present Claim.

52. The Claimant worked an average of 35.58 hours per week in the twelve weeks prior to the termination of his employment.

53. He earned a gross weekly wage of £252.42 in those twelve weeks. He was paid fortnightly

54. His gross daily wage was £50.48 in those twelve weeks.

Submissions for Respondents

55. Mr Hughes had helpfully produced a written submission, which he had passed to the Claimant prior to the third day of the hearing. The following is a summary of the submission made. By agreement, he made his submission first.

56. He argued that the recording of the conversation on the Claimant's mobile telephone should be held to be inadmissible. He referred to ***Vaughan v London Borough of Lewisham UKEAT/0534/12/SM,*** in which 39 hours of

recorded material had not been admitted by the Employment Judge as she had not been able to form a view on its probative value, which the EAT agreed with. The EAT had stressed the importance of transcripts.

57. By the time of the submission the Claimant had produced a transcript, but Mr Hughes argued that it had two sections that were blank, one sentence was not what was audible and the Claimant had accepted that he had filled in the parts that were not audible, and that the context of remarks was significant, such that where not all of the recording was audible none should be permitted.

58. He argued that there had been no dismissal. He invited me to prefer the evidence of Mrs Ward. He accepted that the written contract had not kept pace with the changes, and that the reference to contracted hours by Mrs Ward at the meeting on 18 February 2018 can only to have been the 8 hours in the contract.

59. I asked him what was the basis for the imposition of a role as Team Member, wearing a red shirt, and substantially reduced hours. He accepted that that required agreement with the Claimant, and that further discussion would have been required. He argued that there was no material breach of contract. The outcome had been intended to help the Claimant. He accepted that the Claimant would have taken it as a disciplinary process, but stressed that the Claimant had had an opportunity to continue at the Renfield Street outlet under a different manager.

60. He argued that the Claimant's position was incongruous, and that the words he claimed he had used towards Mrs Ward would not have elicited the response he claims of a dismissal. The catalyst for what had taken place was the words Mrs Ward had said he had used towards her. He sought support from the written statement of Ms Rooney, and the text messages between the Claimant and Mrs Ward.

61. He submitted that if there was a dismissal, the emails with Mr Friel set out a retraction of that, which the Claimant had accepted, and he referred to ***Harris & Russel Ltd v Slingsby [1971] ICR 454.*** He also sought support for that from the texts between the Claimant and Mrs Ward on the evening of 18 February 2018.

62. He argued that if there was a misunderstanding there was no dismissal, and founded on ***Kelly v Riveroak Associates Ltd UKEAT/02900/05/DM.***

63. He invited the Tribunal to dismiss the Claim. I raised with him the issue of the claim for breach of contract, and he argued that there was no material breach, but accepted that if there had been the Claimant would then be entitled to notice. I raised the issue of whether there may be a claim for constructive dismissal pursued, but later the Claimant confirmed that he did not, and in any event Mr Hughes argued that had that been pled the evidence he would have led would have been different.

Submissions by Claimant

64. The Claimant argued that he had been let down by the Respondents, and that the issue between him and Mrs Ward should have been dealt with independently. Mrs Ward had admitted in her evidence that she had said towards the end of the conversation "Get your stuff and go." The only way that could be taken is that that was him out of a job.

65. In relation to the text messages he had not been serious about returning, he was just being cheeky and she knew that. Ms Rooney was going for the role of Assistant Manager, and had not reported accurately what he had said. The phrase she quoted 'Tve been sent home" means that he had been sacked.

66. He confirmed that he did not pursue a constructive dismissal claim, but one that he had been dismissed by Mrs Ward. He pursued his breach of contract

claim as he had worked full time hours for at least a year, and a drop of about 30 hours per week is not, he thought, allowed.

Law

67. Section 95 of the Employment Rights Act 1996 ("the Act") provides, so far as material for this case, as follows:

> **"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),
>
> .....

68. Section 98 of the Act provides, so far as material for this case, as follows:

> **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—
>
> .....
>
> (b) relates to the conduct of the employee,
>
> .....
>
> (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." .....

69. The minimum period of notice required to terminate a contract of employment is set out at section 86 of the Act, commencing as follows

"86 Rights of employer and employee to minimum notice

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more —

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more."

70. The Working Time Regulations 1998 make provision for an entitlement to 5.6 weeks of holiday pay annually, under Regulation 13 and 13A, with accrued entitlement to that arising pro rata where employment terminates under Regulation 14.

71. An issue arose with regard to the recording of the conversation. In assessing whether to receive that evidence and if so what to make of it, if anything, regard is had firstly to the overriding objective, within Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which provides

"2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

72. Secondly regard must be had to Rule 41, which provides:

"41 General

The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."

73. The general position is that if the recording is relevant to an issue in the proceedings, it is admissible unless there is a proper legal basis for its exclusion, ***Chairman and Governors ofAmwell View Schooi v Dogherty [2007] IRLR 198.*** The issue the recording was relevant to what precisely the Claimant had said when told of the reduction to contracted hours and other matters, and secondly what Mrs Ward had said in response to that, which may or may not have been a dismissal. It is an issue addressed further below.

Discussion

(i) Observations on the evidence

74. All of the witnesses were seeking to give honest evidence. Both the Claimant and Mrs Ward were I am sure clear in their own minds as to what had been said in the meeting between them, and gave evidence on what they believed had happened.

75. Whilst there had been an audio recording made of that conversation, it did not clearly record the two most material parts. I did not consider that that part being not clearly audible had been done deliberately by the Claimant. The Claimant's comments in reply to the reduction of hours and related matters were entirely inaudible. Whilst the Claimant produced a transcript, he accepted that he could not hear what had been said by him at that point. When I listened to the recording, I could not hear anything of that part of the conversation at all. I did not consider that the transcript of that sentence was reliable evidence. So far as Mrs Ward's response to that remark is concerned, the Claimant produced within the transcript a sentence, but accepted that he had not heard on the recording the words he quoted, but he had taken them effectively from his memory.

76. When I listened to the recording, which I did with care several times, I could not hear sufficiently clearly to be reliable the first part of what Mrs Ward said in relation to continued employment. What I could however hear, distinctly and clearly, was the phrase "get your stuff and go." I deal below with whether to admit the recording, and if so to what extent.

77. I have found this far from an easy case. Whilst it has a reasonably moderate value it has raised points in the assessment of the evidence, and a consideration of the law in relation to it, that are not straightforward.

(ii) Was there a dismissal?

78. The first issue I require to address is whether or not there was a dismissal under section 95(1)((a) of the Act. The onus of proving a dismissal where that was denied by the Respondents fell on the Claimant.

79. The essential matter was what exactly was said by Mrs Ward at the meeting on 18 February 2O18.Mrs Ward accepted that the Claimant had been told that his hours were to be reduced to contractual and that he would be wearing a red shirt. Mrs Ward accepted that she had not checked what the contract, or statement of terms, provided for. Whilst it was claimed that that change was to help the Claimant, that is not how the conversation was put by Mrs Ward, who instead of setting matters out in the context of giving him assistance so that he could fulfil his duties as Team Leader more effectively made a number of complaints over his performance and behaviours towards her. He responded by not accepting her claims. That was all in the context of their working relationship by then being a poor one. Mrs Ward claimed that she had said that he would only be completing Team Member delegation for the meantime. That was not a simple phrase to understand. As I understood the evidence of Mrs Ward, it was intended to mean working not as Team Leader but Team Member pending retraining in the latter role. The Claimant's evidence was to the effect that he had been told only that he would be wearing a red shirt. For the reasons I come to, I consider that it is not likely that Mrs Ward did explain about the role involving Team Member delegation.

80. The Claimant had thought at the time, he said, that the hours were to be reduced to 4, but latterly claimed that the hours referred to were the 8 in the contract. He claimed that that is why he asked how he could live off 4 hours per week, swearing about that, not directly at Mrs Ward. Whilst he was wrong about the 4 hours, the reference to "contracted hours" can only have been to the 8 hours in the only document that existed, being the Statement, as Mr Hughes accepted. The reference to a reduction to those hours was a

reduction of something over 75% of the working hours he had been working for a period of over a year.

81. Mrs Ward claimed that he had said to her "Go take a fuck to yourself.'*

82. The Claimant's position was that Mrs Ward had then said "that's you out of a job now pal, just get your stuff and leave". He considered that he had been dismissed by that remark, and that that had been recorded by him, which he had then sent to Mr Friel to support his position. He had not produced the recording separately in evidence initially for the reason given above.

83. Mrs Ward disputed that she had told the Claimant that he had lost his job. She said that after she had told him about the dropping of his hours, as she put it, she felt that he was getting agitated, that he had then said "You can go take a fuck to yourself', and she had said something to the effect "You won't have a job here if that's your attitude, go get your stuff." She denied that she had dismissed him.

(a) Admissibility of recording

84. Originally Mr Hughes did not dispute receipt of an audio recording where that would be the best evidence of what had been said. The Claimant initially claimed that the audio recording was about ten minutes long. The first one that he produced to the Tribunal was about ten seconds long. He explained when asked in evidence about it that he had divided the original recording into sections to make it easier to send, and then sent an email to the Tribunal, and Mr Hughes, with what he said was the full recording. It was about three minutes long. It has what I might describe as a number of different sections within it, although they are of differing lengths.

85. The first section of the recording was reasonably clear for most of it. In it, I consider that there is evidence of the Claimant being insubordinate towards Mrs Ward. There are two parts that are not audible. They had been noted as

such within the Claimant's transcript. There is nothing particularly material in the first section however that assists in determining what latterly each of the Claimant and Mrs Ward said to the other.

86. The second section was where Mrs Ward stated that the Claimant was to move to contracted hours, in a red shirt. That is also reasonably clear.

87. The third section was where the Claimant reacted to that, and it is not at all clear, such that that section is I consider wholly inaudible.

88. The fourth section was where Mrs Ward made the disputed comment as to his job. It is only partly audible at best, and it is impossible to be certain as to what is said.

89. The final section was where Mrs Ward told him to "get your stuff and go", and is I consider clearly audible.

90. It appeared to me that where the disputed evidence was of two people only, the Claimant and Mrs Ward, on matters material to the decision of what had been said, and whether or not there was a dismissal, it was within the overriding objective to receive the audio recording and consider it. I took into account that it was reasonably short, that it had been sent to the Respondents at the time, and that Mrs Ward in her written statement sent to Mr Friel commented that she thought that she was being recorded, or at least that that was possible.

91. The ***Vaughan*** case to which Mr Hughes referred was one where the Claimant sought to introduce 39 hours of recorded material, and was not permitted to do so. But the EAT did not exclude the possibility of a lesser volume of material being admitted:

> "It follows that, although we dismiss the appeal because the Judge's order was right in the circumstances in which it was made, we do not believe there is any absolute reason why none of these recordings

should be admissible in evidence. It is not implausible - we can put it no higher - that parts of this 39 hours of material will in fact be potentially relevant and ought to be admitted in the interests of justice. The question arises whether if the Claimant were now to make a fresh application to the Employment Tribunal, producing the transcripts and the tapes of the material on which she wishes to rely, and accompanying them with a clear explanation of why they are said to be relevant, she might get a different result."

92. The ***IDS Handbook on Employment Tribunal Practice and Procedure,*** at paragraph 13.46, records that the Claimant in that case "did, in the end, make such an application and was permitted to adduce material relating to five of the 39 recorded hours."

93. I consider that it is appropriate to make limited use of the recording, being in respect of those parts of it that I consider to be sufficiently clear to be reliably audible. That excludes from use the remark of the Claimant where he swore, and the first part of Mrs Ward's reaction to that, being respectively sections three and four above, as they are not sufficiently clearly audible. I consider that the final section is clearly audible, and can be considered as evidence. The recording must be considered however in the knowledge that the full recording is not complete, that material sections are not audible, and that some at least of the context might therefore be lost. It must therefore be considered with circumspection, and in light of all of the other evidence available.

94. I consider that the transcript itself is not sufficiently accurate to be relied on as evidence.

(b) Witness evidence

95. I considered the question of the reliability of the Claimant and Mrs Ward. The Claimant was clear when giving his own evidence as to what had been said

by Mrs Ward during the meeting, and made a number of concessions on matters of fact where that was contrary to his interest. One example is that he accepted in cross-examination that he had expressed obvious signs of disagreement with Mrs Ward in meetings with others present by shaking his head and rolling his eyes. Against that however were areas where his reliability was in question, such as his reference to the recording being ten minutes long when it was three, the reference to contracted hours being 4, his transcript not being accurate, and (as I shall come to) what he said to Ms Rooney. Overall however I considered that he was consistent in maintaining that he had been dismissed, and had acted quickly in stating that both to Mrs Ward and Mr Friel.

96. Mrs Ward was also clear when giving her evidence, and had that same evening sent a message to the Claimant denying that she had dismissed him. She maintained her position during evidence.

97. She had however accepted in cross examination that she had said something to the effect of “get your stuff and go”. The final, and clear section, of the recording confirms that Mrs Ward told him to get his stuff and go. That is, I consider, supportive of the Claimant’s evidence that the preceding phrase was to the effect that his remark had meant that he had just lost his job. That reference to “and go” was not what Mrs Ward’s evidence had been initially, which was that she had just said "get your stuff'. In the statement she gave Mr Friel no mention is made of using the phrase “get your stuff and go” at all. That is I consider a surprising omission from that statement.

98. It appeared to me that there were aspects of the evidence of each of the Claimant and Mrs Ward where their evidence was not reliable.

99. The phrase of get your stuff and go was however accepted finally to have been used, and is more likely to have been said following a dismissal, I consider. It was suggested that it was a reference to going to Renfield Street, but that appears to me to be unlikely. The tone and pitch of voice when that comment of get your stuff and go was made, which is audible in the recording,

is also in my view consistent with her having said that he had lost his job, not as she claimed that he would do so with such an attitude. It had the quality of a cadence about it.

100. The Claimant was in my assessment insubordinate towards her initially during that conversation, and then reacted to what she told him about the hours and red shirt by swearing at her directly, for reasons I explain below. I consider that such direct swearing at her is more likely to have provoked Mrs Ward as his manager to a dismissal. Mr Hughes argued that the Claimant's alleged remark, about how could he live on such a level of reduced income, was not likely to have led to a dismissal, and I consider that he is right in that, but if someone is sworn at in the manner Mrs Ward claimed, and as I have found, a reaction of saying something to the effect that the person has just lost his job is understandable, even if it may not comply with the normal procedures.

101. In the second section of the audio recording there is no reference that I have heard to acting only in Team Member delegation or similar, nor is there any period that is inaudible where such a remark might have been made. I also took into account the email from Mr Friel, which had followed an initial discussion about the events with Mrs Ward, on 19 February 2018 when he stated "Mid-way through this conversation and without hearing any solution ....." The inference from that is that Mrs Ward had not got to the point of explaining what was intended, which is what I take to be meant by the reference to "solution". I consider it likely that Mrs Ward had not informed the Claimant as to conducting Team Member delegation only. In particular, she did not inform him that there would be a form of re-training for the Team Member role. Whilst she may have intended to do so, and may not have done so as the Claimant reacted to what he had heard, that remark with regard to duties was not I consider stated by her.

(c) Statement of Ms Rooney

102. The Respondents founded on the statement from Mrs Rooney. The Claimant sought to challenge it. It includes a comment she says was made by the Claimant, almost immediately after the meeting with Mrs Ward, which is I consider more consistent with a dismissal than a resignation. It states 'Tve been sent home, I'm leaving". That I consider is more consistent with a comment that the person has lost his job than, for example, being told to go to the Renfield Street outlet, or with a resignation which is what Mrs Ward said had taken place. To be sent home is not a resignation.

103. It appears to me that the written evidence of Ms Rooney is material, particularly where the evidence of each of the Claimant and Mrs Ward on the aspects of what each said which is disputed by the other may not be reliable. Whilst it is certainly the case that she was not called to give evidence, and the Claimant suggested that she may have given her statement to support her application to become Mrs Ward's assistant, a role she now occupied, the Claimant had been speaking to Ms Rooney and having a cigarette with her shortly before the events that day without difficulty, and he spoke to her again when he left as he accepted. It appeared to me that there was no reason to consider that she had not written down her recollection of what he had said, and as indicated above part of that was supportive of the Claimant's position on the issue above. What she said the Claimant said is consistent with Mrs Ward's evidence of him swearing at her. It did not appear to me from those conclusions that Ms Rooney was likely to have been partial.

104. It appeared to me more likely that Ms Rooney had simply recorded what she had been told by the Claimant almost immediately after the incident.

(d) Other aspects

105. I was concerned that the Claimant had produced a transcript which had, for the section of what Mrs Ward said about his job, his recollection of what was said, and not what he heard on the recording. I noted also that the transcript

for the latter phrase had the word "leave" not "go". The word "go" is I consider clearly audible, and was the word that was used.

106. The Claimant had written to Mr Friel on 19 February 2019 with the audio file and had the quotation "Just get your stuff and go that's you out of a job." That is not exactly what was said, in that the order is inverted with the last remark being get your stuff and go. He was it appears to me setting out his recollection the day after the event. It is reasonably if not entirely accurate I consider. The Claimant is 20 years of age, not experienced in litigation, and I consider that the transcript issues that I have identified as not improper attempts to provide evidence, and to his great credit Mr Hughes did not argue that there had been any dishonesty in preparing the transcript.

(e) Retraction

107. Mr Hughes argued that if there had been a dismissal, that had been retracted, and that retraction accepted by the Claimant, under reference to the case of ***Slingsby.*** Considering all of the evidence, I do not accept that there was any acceptance of a retraction by the Claimant. The Claimant made clear his position in an email to Mr Friel on 19 February 2018 which was that he was not returning to work. Whilst he had made a comment about returning to work in a text to Mrs Ward on the previous evening that was in response to her claim that he had not been dismissed, and was not in all the circumstances a serious remark, not taken as a serious remark, nor one that he followed up by acting upon, or one Mrs Ward followed up on. The Claimant made clear his actual position the following day.

(f) Conclusion

108. I consider in conclusion that Mrs Ward did say something to the effect that the Claimant was out of a job in response to the Claimant who had sworn in a remark directed at Mrs Ward, rather than as he claimed about how he could

live on such reduced pay. Mrs Ward had also said that he should get his stuff and go.

109. I consider that in all the circumstances what transpired between them amounts to a dismissal under the statute, as well as notice of termination of employment for contractual purposes.

110. There is a further and separate matter that led me to conclude that there had been a dismissal. Where the extent of a change imposed unilaterally by an employer is prejudicial to a sufficiently material extent that imposed change may amount to a termination of the contract of employment then in existence, and amount to a dismissal under the Act. Mr Hughes argued that there had been no material breach, but I consider that there was.

111. There clearly were performance and behavioural concerns which required to be addressed. The Claimant did not accept many of them, but did in respect of some. The Statement of Main Particulars of Employment refers in such situations to the application of the disciplinary policy. Whilst the policy is stated to be non-contractual, I consider that the import of the term of the contract relating to that policy is that the disciplinary policy is engaged if standards of performance or behaviour are not maintained. Whilst the Statement is not in terms the contract, it is evidence of the contract, and the only document that exists.

112. The Respondents considered that the Claimant had not maintained such standards. If the intended outcome of the meeting was to reduce hours by 75%, or even by about 50% as Mr Friel may have intended (but which Mrs Ward did not articulate) it appears to me that unless there is agreement on the part of the employee, not present here, the disciplinary procedure should be engaged as a first step. In addition, the Claimant's role and status was being changed from management, to an operative non-management level, visibly by the change of shirt colour. Whilst the rate of pay per hour may not have changed, the reduced hours would have led to a material reduction in income, for a period that was not even discussed, and may have become

lengthy if the performance was not deemed adequate to return to the management level. I consider those changes to be material, and had been imposed unilaterally.

113. In ***Hogg v Dover College [1990] ICR 39*** a teacher was told that his full-time employment as head of history would be replaced by a part-time post which did not include that role, and reduced his pay and teaching load by 50% at least. He objected to this but nevertheless accepted the new job in order to mitigate his loss, working under protest. The EAT held that the imposition of the new terms was a dismissal.

114. In ***Alcan Extrusions Ltd v Yates [1996] IRLR 327*** the employers unilaterally introduced a rolling shift system to replace a fixed shift system. The tribunal held that that was a repudiation of the contract which constituted a dismissal. The EAT held that the tribunal was entitled to reach this conclusion. It expressed the position as follows:

> "We entirely agree with counsel for the appellants that it is only where, on an objective construction of the relevant letters or other conduct on the part of an employer, it is plain that an employer must be taken to be saying, 'Your former contract has, from this moment, gone' or 'Your former contract is being wholly withdrawn from you' that there can be a dismissal under [s 95(1)(a)] other than, of course, in simple cases of direct termination of the contract of employment by such words as 'You are sacked'. Otherwise, we agree with him the case must stand or fall within [s 95(1)(c)].
>
> However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal under [s 95(1)(c)]. In our judgment, the departure may, in a given case, be so substantial as to amount to the withdrawal of the whole contract. In our judgment, with respect to him, the learned

> judge in Hogg was quite correct in saying that whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and, we would hold accordingly, a question of fact for the [employment] tribunal to decide."

115. In ***Mostyn v S and P Casuals Ltd UKEAT/015,*** the employer proposed a reduction in basic pay by 45% and an increase in commission for a salesman, who had not received a written contract or statement of terms. At paragraph 3 the comments of the then President of the EAT on the sift were noted, which included the following:

> "Whether a breach is repudiatory breach or not does not depend on whether it is fair to change the terms of the contract, but whether the contract is broken in a sufficiently serious way. Langstaff J then referred to the decision of the Court of Appeal in ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, [2011] 1 QB 323,*** in particular at paragraph 28. He said that a reduction in pay is almost always, if not always, repudiatory unless it is consented to."

116. I consider that the Respondents' actions in imposing reduced hours in the manner that they did, for a period that they did not specify, and with reduced status made visible by a change to a red shirt, did amount to a dismissal under the statute as it amounted to the termination of the then existing contract of employment.

117. Despite the eloquence of Mr Hughes' submissions, therefore, I have concluded that the Claimant was dismissed by the Respondents.

(iii) Reason

118. The second issue is what was the reason for that dismissal. It was clearly conduct. Conduct is potentially a fair reason for dismissal under section 98(2) of the Act.

(iv) Fairness

119. The third issue is whether the dismissal was or was not fair under section 98(4) of the Act. There is no onus on either party to prove or disprove fairness. It is also clear that a dismissal under section 95(1)(c) may be a fair dismissal under section 98(4).

120. The Respondents had what was a proper concern over performance to manage, but that, I consider, ought to have included adequate investigation, and an opportunity for response by the Claimant. The first meeting took place with no formal warning of it. I do not consider that a unilateral and more or less immediate imposition of amended and substantially reduced terms as to status and hours was within the range of reasonable responses open to a reasonable employer. The guidance given in ***BHS v Burchell [1978] IRLR*** 379 was simply not followed.

121. Whilst following a process with an employee before deciding to dismiss, which in this context includes the unilateral imposition of changes to status and working hours, is not a rule of law that must always be followed, the importance of doing so was set out in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503,*** in which Lord Bridge made the following comments:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are: (a) that the could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as

> a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation .....

122. The Tribunal is also required to take into account the ACAS Code of Practice. I consider that its terms were not followed as there was in all material respects no process followed at all. The reduced hours spoken of by Mrs Ward were a form of disciplinary penalty for what was thought to be insufficient performance. Allied to that was a reduction in status. I consider that that is not something that can fairly be imposed without any process at all, but that is what the Respondents did.

123. I consider that in all the circumstances there was an unfair dismissal under the terms of section 98 of the Act.

(v) Remedy for unfair dismissal

124. The Claimant is entitled to a basic award under section 119 of the Act, and in light of the Claimant's age (20) and years of continuous service (4) is £504.84.

125. Section 122(2) of the Act states:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to

> reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

126. I consider that the Claimant did contribute to the dismissal by his conduct, both generally in relation to performance but more particularly by what he said to Mr Ward when informed of the reduced role, which I consider led her to make the comments as to dismissal I have found. I take into account that that reduced role had been made without prior process, but it had followed periods where he had been insubordinate towards her at least to some extent. I have reduced the basic award by 30%, and the net sum is that which is awarded in the Judgment

127. No compensatory award under section 123 of the Act was sought by him.

(vi) Breach of contract

128. I consider that the Respondents did terminate the contract of the Claimant. Whilst the Claimant's behaviour was not appropriate, the fundamental reason for it was the unilateral reduction in status and hours, which I consider is a breach of express terms of contract by them for the reasons set out above.

129. In any event, in every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20,*** which was slightly amended subsequently. The term was held in Malik to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

130. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that

the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT.*** As Judge Burke put it:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."

131. I consider that the Respondents were in breach of such an implied term, separately from breach of express terms. The changes they imposed were likely to destroy, or at least seriously damage, the relationship of trust and confidence explained in the cases above.

132. The Claimant is entitled to the minimum statutory notice of 4 weeks' pay for that., at the amount of his weekly gross pay, which is also what the Statement provided for. The Claimant gave evidence of his attempts to obtain employment, and he was successful in doing so but outwith the four week period. Mitigation was not argued by the Respondents having heard his evidence. Four weeks' pay is £1,009.68.

(vii) Holiday pay

133. There was no dispute as to the statutory basis for the claim for accrued holiday pay under the 1998 Regulations, or under contract, the issue was simply to work out what if anything was outstanding. No submissions were made on this aspect of the Claim.

134. The Respondents led evidence as to the holidays taken by the Claimant, which he did not dispute. That evidence from the Respondents (p.83) indicated that there had been ten days outstanding towards the end of the calendar year, five had then been taken in 2018 (p.82), but that the holidays had been calculated to the end of the holiday year, which was to 31 March

2018. The accrual was 2.33 days per calendar month. Reducing the five days for the period not accrued to the end of the year from 18 February 2018 to 31 Mach 2018 resulted in 1.84 days having accrued but not taken, which I rounded off to 2 days, which is the sum of £100.96.

Conclusion

135. There was a dismissal of the Claimant by the Respondents, it was unfair, there was a breach of contract by the Respondents, and the Claimant had an entitlement to two days accrued holiday pay.

136. The awards set out in the Judgment are made gross, and for notice and holiday pay are to be paid subject to appropriate statutory deductions. The Respondents when making such deductions should confirm the amount thereof and that payment has been made to Her Majesty's Revenue and Customs by writing to the Claimant to confirm that when done, and their doing so shall discharge the liability to make payment in respect of those deductions.

Employment Judge: A Kemp
Date of Judgment: 26 October 2018
Entered in register: 01 November 2018
and copied to parties