

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102998/2019

Held In Glasgow on 21 October 2019

Employment Judge: Lucy Wiseman

15 Mr Kevin Frizzell

**Claimant
In Person**

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Grampian Blinds Ltd

**Respondent
Represented by:
Mr S Maguire
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Tribunal decided:

- (i) to dismiss the complaint of unfair (constructive) dismissal;**
- (ii) to dismiss the complaint in respect of payment of a redundancy payment;**
- (iii) to dismiss the complaint in respect of holiday pay;**
- (iv) to dismiss the employer's contract claim and**

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- (v) to find the complaint of an unauthorised deduction from wages to be well founded and to order the respondent to pay to the claimant the sum of £197.51 (being £36.82 in respect of two days' sick pay and £160.69 in respect of commission).

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 18 March 2019 alleging he had been unfairly (constructively) dismissed, discriminated against because of the protected characteristic of disability, breach of contract in respect of the payment of notice, redundancy payment, unauthorised deduction of wages and holiday pay.
2. The respondent entered a response denying the claims in their entirety. The respondent raised an employer's contract claim.
3. The complaint of discrimination because of the protected characteristic of disability was withdrawn by the claimant and dismissed on 14 October 2019.
4. The claimant, during the course of the hearing, withdrew the complaint in respect of holiday pay; and the respondent withdrew the contract claim. The respondent also conceded a payment of £36.82 in respect of two days sick pay, plus a payment of £160.69 in respect of commission was due to be paid to the claimant. Accordingly, the issues before this Tribunal for determination were:
- (i) was the claimant entitled to resign from employment by reason of the respondent's conduct and, as such, was the claimant constructively dismissed by the respondent in terms of section 95(1) Employment Rights Act;
 - (ii) if so, was the claimant's dismissal fair or unfair in terms of section 98(4) Employment Rights Act and

(iii) is the claimant entitled to be paid a redundancy payment.

- 5 5. I heard evidence from the claimant and from Mr Stuart Davidson, Group Operations Manager. I was also referred to a file of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

- 10 6. The claimant was employed by the respondent from 30 January 2006 until the termination of his employment on 11 January 2019.
7. The claimant was employed as a Manager within the respondent's sales function. The claimant earned £2,916 gross per month, giving a net monthly take home pay of £2,222.
- 15 8. The claimant met with Mr Stuart Davidson, Group Operations Manager, on the 27 November 2018. Mr Davidson informed the claimant there was a vacancy for a Factory Manager and he offered the claimant the position because the claimant had previously held the post. The offer was put in writing (page 53).
- 20 9. The claimant was given time to think about the offer. The claimant advised Mr Davidson on 3 December 2018 that he did not want to accept the offer.
- 25 10. The claimant was driving to work on Friday 7 December when he started to feel unwell and thought he was having a heart attack. The claimant attended at Wishaw A&E department where, following tests, he was told that he had suffered a severe panic attack and needed to make changes to his life.
- 30 11. Mr Davidson noted the claimant had not attended for work on 7 December and, by looking at the tracker information on the company vehicle, he saw the claimant was at the A&E department. Mr Davidson sent two employees to the hospital to enquire after the claimant and to recover the vehicle.

12. The claimant explained to the two employees what had happened and was taken home by one of them.
13. The claimant subsequently visited his GP and was given a sick note which he
5 emailed to the respondent. The claimant spoke with Mr Davidson on Saturday 8 December to tell him he would be absent for the next week.
14. The claimant met with Mr Davidson and Ms Margaret Patrick, Director, on
10 Friday 14 December. The claimant presented another sick line for a further week which stated the reason for absence was "anxiety". The claimant told Mr Davidson that the GP had told him he did not need to use the sick line and could return to work on Monday if he felt like it.
15. Mr Davidson discussed with the claimant the causes of the anxiety (which
15 were both work and personal). He then informed the claimant that he would not be permitted to drive the company vehicles until his GP had verified his fitness to drive. Mr Davidson gave the claimant an access to medical records consent form to sign.
- 20 16. Mr Davidson told the claimant that the two people who had visited the hospital had provided statements (pages 74 and 75) stating the claimant had told them he had blacked out on 7 December. The claimant denied this and told Mr Davidson he had said he "felt" he might black out.
- 25 17. Mr Davidson confirmed the position regarding driving the company vehicles and further confirmed there was work at Wishaw in the office or the factory that the claimant could undertake meantime.
18. The claimant was upset by what had happened and left the meeting saying
30 he felt he was being discriminated against due to his mental health.
19. Mr Davidson wrote to the claimant's medical practice on 18 December (page 57) to ascertain whether the claimant was fit to drive a company vehicle.

20. The claimant remained absent from work until 4 January 2019 when he emailed Mr Davidson (page 60) to give one weeks' notice of his resignation.

5 21. Mr Davidson replied (page 61) to accept the resignation and confirm the last date of employment would be 11 January 2019.

22. The claimant's GP practice responded to Mr Davidson's letter on the 9 January (page 78) confirming the claimant was currently unfit for work
10 because of anxiety and panic symptoms, but that he was fit to drive.

23. The claimant had, on the 4 January 2019, received a phone call from the owner of City Blinds, offering him a job in sales. The claimant decided to take it. The claimant commenced employment on 14 January 2019. The claimant
15 is earning approximately £23,000 per annum.

Credibility and notes on the evidence

24. There were no real issues of credibility in this case, although there were three disputes in the evidence of the claimant and Mr Davidson. The claimant's
20 position was that on 14 December Mr Davidson had asked again if he was going to take the job in the factory. The claimant had said no. The claimant felt that it was because he had said no to the job offer that Mr Davidson stopped him from driving, and that none of this would have happened if he had accepted the job.

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25. The claimant told the Tribunal he asked Mr Davidson how he was meant to get to work if he could not drive, and Mr Davidson had responded that it was not his problem.

30 26. The claimant asserted he had been told by Mr Davidson that the company had too many sales people. The claimant believed he was entitled to a redundancy payment for this reason and to compensate him for his long service with the company.

27. The breach of contract relied upon by the claimant was being told he could not drive the company vehicles until a doctor confirmed he was fit to do so.

5 28. Mr Davidson denied the issue of the Factory Manager job had been raised on 14 December. His position was that the offer had been rejected by the claimant on 3 December and not raised again. The claimant had been stopped from driving because of the respondent's duty of care to him and others.

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29. Mr Davidson also denied that he had told the claimant getting to work was his problem. Mr Davidson asserted he had offered the claimant a lift to work.

15 30. I, on balance, preferred the evidence of Mr Davidson that the issue of the job offer had not been discussed again after 3 December. I accepted that after the offer had been made, and rejected, the matter was at an end.

20 31. I also accepted that Mr Davidson may have intended to offer the claimant a lift to work, but, as he stated in his evidence, the discussion did not get to the stage of whether the claimant would return to work or remain off sick. The claimant ended the meeting abruptly when he referred to being discriminated against. I could not accept that Mr Davidson had, in fact, offered the claimant a lift because I was satisfied that if he had, the claimant would have accepted.

25 32. I also preferred Mr Davidson's evidence that he did not tell the claimant there were too many sales people.

30 33. I did not consider the claimant was untruthful in these matters, but that his recollection was impaired by the fact he was upset about being told he could not drive until medically certified as fit to do so.

Claimant's submissions

34. The claimant questioned why he would leave a job he had held for 15 years and go to a lesser paid job? He told the Tribunal that if he had been offered transport to get to work he would have taken it because the key issue for him was to support his family. The claimant felt he could not wait any longer for the medical report to get to the respondent and so he had decided to resign and take the job offer.

Respondent's submissions

35. Mr Maguire referred the Tribunal to the cases of **Malik v BCCI 1997 IRLR 462** and **Leeds Dental Team Ltd v Rose 2014 ICR 94**.
36. Mr Maguire submitted the respondent was under a duty to ensure the claimant was fit and able to undertake the driving duties of his role and they had been acting in terms of their duty of care in stopping the claimant from driving until such time as they received a medical report from his GP confirming he was fit to drive.
37. Mr Maguire invited the Tribunal to accept the evidence of Mr Davidson that the job offer had not been discussed again after the 3 December.
38. Mr Maguire submitted the claimant had not shown a fundamental breach of contract and accordingly the claim should be dismissed. Further, the claimant had not been redundant and was not entitled to a redundancy payment.
39. Mr Maguire confirmed the respondent accepted the sum of £197.51 was due to be paid to the claimant and agreed payment would be made, at the latest, within 7 days of the date of this Judgment.

Discussion and Decision

40. I firstly had regard to the terms of section 95 Employment Rights Act which provide that there is a dismissal when the employee terminates the contract,

with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

41. An employee, in order to claim constructive dismissal, must establish the following:

- that there was a fundamental breach of contract on the part of the employer;
- that the employer's breach caused the employee to resign and
- that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

42. The claimant asserted the respondent's conduct had breached the contract of employment when they informed him that he could not drive until the respondent received a medical report confirming he was fit to drive. I could not accept the claimant's assertion in circumstances where the claimant had had to stop driving in order to be taken to the A&E department on the 7 December because he thought he was having a heart attack. There was no dispute regarding the fact the claimant had been told, following various tests, that he had suffered a panic attack rather than a heart attack, but it had still impacted on his ability to drive.

43. The respondent has a duty of care to the claimant and to others who may be affected by his actions. I considered it entirely reasonable and in keeping with the duty of care for the respondent to stop the claimant from driving until such time as they had received a medical report from his GP confirming he was fit to drive.

44. The claimant understood why the respondent had taken the decision regarding him driving, but sought to argue the decision had been motivated by the fact he had rejected the job. The claimant reasoned that if he had

accepted the Factory Manager vacancy, the issue regarding driving would not have been raised. There was no evidence to support that proposition and I could not accept it in circumstances where the concerns regarding him driving would have been the same.

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45. The claimant was offered work at the Wishaw factory or office whilst the respondent waited for the medical report from the claimant's GP. The claimant did not discuss this further with Mr Davidson at the meeting on 14 December because he left the meeting before any discussion could take place.

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46. There appeared to be an issue regarding how the claimant would travel to work when he could not drive a company vehicle. I concluded that although Mr Davidson intended to raise with the claimant the offer of getting a lift to work, this was not in fact done because the meeting ended prior to any such discussion.

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47. I was satisfied the respondent acted reasonably in informing the claimant that he was not to drive a company vehicle until such time as he had been medically certified as fit to do so. The respondent did not, by acting in this way, fundamentally breach the contract of employment. The claimant has been unable to show there was a fundamental breach of contract entitling him to resign and, for this reason, the claim of constructive dismissal must fail.

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48. I next considered the claimant's complaint that he was entitled to be paid a redundancy payment. This claim was based on two factors: firstly the claimant asserted Mr Davidson had told him there were too many sales people and secondly, the payment should be made to reflect the length of service with the company.

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49. I had regard to section 135 Employment Rights Act which provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy or is eligible for a redundancy payment by reason of being laid off or kept on short time.

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Section 139 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed, or to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.

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50. I preferred the evidence of Mr Davidson that he did not tell the claimant there were too many sales people. However, even if I had found Mr Davidson did make that comment, it is not sufficient to demonstrate there was a redundancy situation.

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51. The provisions of sections 135 and 139 (above) make clear that a redundancy payment is only payable if an employee is dismissed by reason of redundancy. An employee's length of service with a company affects the amount of a redundancy payment, but does not demonstrate entitlement to a redundancy. I was satisfied there was no redundancy situation: the claimant was not dismissed by reason of redundancy and accordingly is not entitled to a redundancy payment.

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52. I, in conclusion, decided to dismiss the complaint of unfair (constructive) dismissal and the complaint regarding payment of a redundancy payment.

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53. The claimant withdrew the complaint in respect of holiday pay, and accordingly that complaint is dismissed.

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54. The respondent withdrew the employer's contract claim and accordingly that claim is dismissed.

55. The respondent accepted two payments were due to the claimant, and those payments were £36.82 in respect of two days' sick pay and £160.69 in respect of the payment of commission. I accordingly found the complaint of an unauthorised deduction from wages well founded and I order the respondent to pay to the claimant the sum of £197.51 (being £36.82 + £160.69)

Employment Judge: Lucy Wiseman
Date of Judgment: 28 October 2019
Entered in register: 30 October 2019
and copied to parties