



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101360/2022

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Held via Cloud Video Platform on 10 and 11 May 2022

Employment Judge Brewer

10 **Mr S Smith**

**Claimant
Represented by
Ms L Campbell
Solicitor**

15 **Norscot Truck and Van Limited**

**Respondent
Represented by
Mr G Mitchell
Group Operations
Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim of unfair dismissal fails and is dismissed.

REASONS

25 **Introduction**

1. This claim came before me for a final hearing over three days commencing 10 May 2022. In the event the evidence was concluded on day one and I heard submissions on the morning of 11 May 2022 and delivered an oral judgement in the afternoon of 11 May 2022. I set out below the detailed reasons for my judgment.

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2. The claimant was represented by Ms Campbell, a Solicitor, and the respondent was represented by Mr Mitchell its Group Operations Manager.

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3. I heard evidence from the claimant, and he called one witness, a former colleague Mr Liam Deas. The respondent called three witnesses: Ewan Taylor, shift supervisor, Ian Campbell, workshop manager, and Ian McGregor, general manager. All of the witnesses gave their evidence under oath.

4. Finally, there was an agreed bundle of productions running to 48 pages plus one additional document. I have taken account of documents I was taken to during the evidence.

5. Before hearing the evidence, I agreed with the parties what the issues were in the case, and I set those out below. I also set out, principally for the benefit of Mr Mitchell, the procedure the tribunal would follow and gave explained to him the purpose of cross examination

Issues

6. The claimant's claim is for unfair dismissal. The respondent denies that the claimant was dismissed. The claimant was clear that he was not claiming constructive dismissal.

7. It follows that the issues I had to determine were as follows:

- a. Was the claimant dismissed?
- b. If the claimant was dismissed, what was the reason or principal reason for dismissal?
- c. Was it a potentially fair reason?
- d. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

8. I note that, if I was to find that the claimant had been dismissed, the respondent does not put forward any reason for dismissal and therefore there may be subsidiary questions in relation to the fairness of any dismissal dependent upon any finding I make as to the reason for dismissal.

Relevant Law

9. As will be apparent below, taking the claimant's case at its highest and as confirmed by Ms Campbell in her submissions, the claimant left work believing he had been dismissed by words said by his manager, Ian Campbell which it is accepted were ambiguous but which, Ms Campbell says, looked at in context were nevertheless reasonably understood by the

claimant to amount to words of dismissal. Given that, I consider that the following law is relevant.

10. The right not to be unfairly dismissed is set out in the Employment Rights Act 1996 (ERA) in the following terms

5 *“94 The right.*

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

11. The ERA also sets out definitively what amounts to a dismissal for unfair dismissal purposes as follows

10 *“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)

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

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

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12. A preliminary question that arises in this case is whether there has in fact been a dismissal at all. In these circumstances the burden of proof falls on the claimant to show a dismissal. The standard of proof is that of the ‘balance of probabilities’ - the employment tribunal must consider whether it was more likely than not that the contract was terminated by dismissal, rather than, for example, by resignation or by mutual agreement between employer and employee.
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13. As indicated above, the claimant accepts that the words used, which he took to be words of termination, were ambiguous but he says that it was
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reasonable for him to conclude that he had been dismissed. Broadly speaking, the test as to whether ostensibly ambiguous words amount to a dismissal, or a resignation is an objective one:

- a. all the surrounding circumstances must be considered
 - 5 b. if the words are still ambiguous, the employment tribunal should ask itself how a reasonable employee would have understood them in the circumstances.
14. Any ambiguity is likely to be construed against the person seeking to rely on it — **Graham Group plc v Garratt** EAT 161/97.

10 **Findings in fact**

15. I make the following findings in fact.
16. The respondent business, at least in relation to this claim is concerned with the maintenance and servicing of heavy goods vehicles. The claimant was employed in the respondent's Dundee workshop. The environment in the workshop is what one might expect in a relatively male dominated workplace where hard manual work is being undertaken, in that there is a lot of 'shop-floor' banter and swearing is not uncommon.
17. The claimant was employed by the respondent from May 2018 as an HGV mechanic. He worked a shift pattern of one week on a day shift followed by a week working what is called a back shift. On the back shift the claimant worked from 1:30 pm until 10:00 pm Monday to Friday. It was a matter of dispute as to whether those working the back shift on Friday also had to work on the Saturday morning. The respondent's evidence was that even if this was not a strictly contractual requirement, it was an expectation. The claimant's evidence is that there was no contractual requirement for him to work on the Saturday following the Friday back shift.
18. Whether this is a significant issue is a moot point, but it is a matter which the parties gave evidence upon, and it is a matter which can be resolved. The claimant's contract of employment is in the bundle of productions and starts at [27]. Clause five of the contract deals with hours of work and the first paragraph states:
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“your normal working hours shall be 40 hours per week as per the current shift pattern used at your working depot and Saturday as pattern as part of overtime”

- 5 19. I conclude from this that there was a contractual requirement to work on a Saturday where there was a pattern of Saturday working as part of the shift pattern.
- 10 20. Furthermore, the claimant’s own actions in seeking, as he said, permission not to turn up for work on the Saturday from his then shift supervisor rather suggests that he did consider that he was required to work unless he had authority not to work. In short, if there was no requirement to work then there was no requirement to seek permission not to work yet the claimant did so. I conclude that the claimant did consider that he was required to work unless he had permission not to.
- 15 21. The claimant worked a back shift on the week ending Friday 15 October 2021. It was expected that he would have then worked on the morning of Saturday 16 October 2021, but he did not. The claimant says that he sought and obtained authority from his then shift supervisor Mr Ewan Taylor to not work on the Saturday. Mr Taylor's evidence was that he had been employed by the respondent for seven years and was a shift supervisor, sometimes called a charge hand. His evidence was that the claimant simply told him that he would not be coming in on Saturday 16 October. Under cross examination Mr Taylor said that he thought that he could not require someone come into work on the Saturday but likewise that he did not have authority to allow someone to not come in.
- 20 22. In any event as we know the claimant did not turn up to work on Saturday 16 October and this was the 4th occasion on which he failed to do work the Saturday following a back shift.
- 25 23. The claimant next attended for work on the morning of Monday 18 October 2021. His normal start time was 8:00 am and he arrived for work shortly before then.
- 30 24. The claimant’s immediate line manager was Ian Campbell who has worked for the respondent for over seven years and is currently and was at the material time the workshop manager.

25. Mr Campbell did not have authority to either hire or fire staff although he was able to give verbal warnings. Mr Campbell was aware that the claimant had not turned up for work on 16 October and, to put it neutrally, he took issue with the claimant about that. This is a matter of considerable dispute, and I shall deal with my findings on this below. But what is clear is that shortly after 8:00 am on 18 October 2021 the claimant left work never to return.
26. After the claimant left work, Mr Campbell advised his manager, Ian McGregor, general manager, about what had taken place. Mr McGregor is responsible for both the Dundee and Perth workshops run by the respondent. He is the person responsible for hiring and firing staff. At the time of the contact, Mr McGregor was not in Dundee but given that the claimant had left he did not see the need to return to Dundee that day and instead dealt with the matter on the following day, 19 October 2021.
27. On 19 October 2021 Mr McGregor endeavoured to telephone the claimant and when he could not obtain him, he sent him a text message a screenshot of which appears at [38]. The message read:
- “Hi Steven Ian from Norscot here just looking to speak to you regarding what you are wanting to do”*
28. The claimant confirmed that he received that text but that he did not respond to it.
29. Having not obtained a response to his text message Mr MacGregor wrote to the claimant on 20 October 2021 and a copy of that letter appears at [39]. This was sent by recorded delivery and confirmation of delivery appears at [40].
30. The claimant says that he did not receive the letter. It is clear that the letter was sent to the correct address for the claimant and that it was delivered by Royal Mail. It remains a mystery as to why the claimant did not receive the letter. By the content of the letter, it is clear that the respondent did not consider that it had dismissed the claimant and noted that if they did not hear from the claimant then they would take his failure to come to work as his resignation without notice. Clearly there was no response to the letter and the respondent therefore issued the claimant his final pay and a P45.

31. The claimant commenced early conciliation on 6 January 2022, and he received his early conciliation certificate on 2 February 2022.
32. The claimant presented his claim to the tribunal on 1 March 2022.

Observations on the evidence

- 5 33. The oral evidence in this case was rather short given what is said to have taken place. On any analysis of the evidence it is clear that the claimant did not turn up for work on Saturday 16 October, on Monday 18 October there was something of a confrontation between Mr Campbell and the claimant and the claimant walked out never to return.
- 10 34. The witnesses were broadly credible but that is not to say that I accept everything they said, and I shall deal with the material points below. I did however find the evidence of Mr Deas problematic in a more general sense. His evidence was that he was at work at 8:00 am on 18 October 2021, he said that he heard Mr Ian Campbell shouting and swearing and
15 arguing with the claimant for three or four minutes. He started off by saying that the shouting and swearing was about the claimant not working on Saturday. He said that the claimant remained calm and did not raise his voice but also that *"I don't think [the claimant] said anything"*. How could he know that the claimant was calm if he could not see him? How is it that
20 he only thought that the claimant did not say anything? Mr Deas also said that he clearly heard Mr Campbell say, *"if you aren't happy you can get your tools and get out"*. Under cross examination Mr Deas said that as no work had started in the workshop he could hear quite clearly, he confirmed that the claimant did not say anything although he could not recall
25 completely but that what took place was quite shocking.
35. It seems to me to be somewhat inconsistent to say that there was an argument when in fact it was also Mr Deas' evidence that the claimant did not say anything. Furthermore, despite the fact that Mr Deas said it was quiet such that he was able to here quite clearly, the only thing he said he
30 can recall having heard were the words I have quoted above about the claimant getting his tools and leaving. In other words, Mr Deas' evidence amounts to this: it was quiet enough for him to hear everything, there was a three- or four-minute argument, Mr Campbell was shouting and

swearing, the claimant said nothing, yet the only specific thing he could recall actually being said were the almost exact words the claimant relies upon as amounting to words of dismissal. I did not find Mr Deas a credible witness.

5 **Respondent's submissions**

36. Mr Mitchell's submissions were understandably short. His case is quite clear that the words attributed to Mr Campbell by the claimant as amounting to words of dismissal were not said at all. He says that, that the claimant simply walked out because he was planning to leave anyway, and
10 he asks that I dismiss the claim.

Claimant's submissions

37. Ms Campbell's submissions were that there was no requirement for the claimant to work on the Saturday morning following a week on the back shift, that the claimant had permission to not attend for work on Saturday
15 16 October 2021, that on Monday 18 October 2021 the claimant had suffered abuse at the hands of Mr Ian Campbell and that Mr Campbell had said to the claimant that if he was not happy he could take his tools and go and that these words, although ambiguous, were reasonably understood by the claimant to amount to words of dismissal taking into account all of
20 the surrounding circumstances.

Decision

38. Let me deal first with the core allegation. the claimant says that on Monday 18 October 2021 Mr Campbell said to the claimant "if you don't like it, get your tools and go".

25 39. As I have set out above, in general, other than in relation to Mr Deas, I found the witnesses largely credible. There is a dispute of fact between the claimant and Mr Campbell. The claimant attributes very specific words to Mr Campbell which he says were words of dismissal. Mr Campbell says he said no such thing.

30 40. On balance I prefer the evidence of Mr Campbell. Using words indicating that somebody's employment is at an end would not be done by somebody as experienced as Mr Campbell in the sure and certain knowledge that he

did not in fact have authority to terminate someone's employment. Furthermore, as everyone agreed someone with the skills of the claimant would be very hard to replace and the effort made by the respondent to contact the claimant to try and understand what had taken place strongly suggests that they did not wish him to leave their employment. If I am correct then the words attributed to Mr Campbell were not said and there were no words of dismissal in which case the claimant's claim must fail.

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41. However, if I am wrong about that and Mr Campbell did say "*if you don't like it, get your tools and go*", do these amount to unambiguous words of dismissal or if they are ambiguous was it reasonable for the claimant to conclude that he had been dismissed by them?

42. I agree with Ms Campbell that the words are ambiguous and I should ask how a reasonable employee would have understood them in the circumstances.

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43. The claimant says that Mr Campbell was aggressive and was shouting and swearing. On any reading of this evidence the words attributed to Mr Campbell if they were said at all were said in the heat of the moment.

44. The context and surrounding circumstances were as follows:

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- a. the claimant was a skilled worker, he would be difficult to replace;
- b. there was at least an expectation that staff working the back shift which ended on the Friday would also work on the immediately following Saturday morning;
- c. the working environment was what might be described as robust in that there was a lot of banter, and shouting and swearing were not unusual;
- d. the claimant is a 61-year-old man who has long service in this industry and at the relevant time had worked for the respondent since 2018 with Mr Campbell as his manager for the entire period;
- e. the claimant had failed to work for four Saturdays and on Saturday 16 October 2021 there was plenty of work to do including MOTs and servicing;

- f. Mr Campbell did not have authority to dismiss any employees;
- g. Mr Campbell accepts that he along with others, including the claimant, used bad language in the workplace;
- h. Mr Taylor, the shift supervisor, did not consider that he had authority to insist on someone working on a Saturday nor to agree that they did not need to work on a Saturday;
- i. on Monday 18 October 2021 Mr Campbell was clearly annoyed that the claimant had failed to attend work on Saturday 16 October and there was something of an argument between them;
- j. after the claimant left work, efforts were made by the respondent to contact him.

45. When considering all the circumstances, tribunals should look at events both preceding and subsequent to the incident in question and take account of the nature of the workplace in which the misunderstanding arose. For example, in **Futty v D and D Brekkes Ltd** 1974 IRLR 130, ET, F was a fish-filleter, and his foreman, fed up with F's banter, said, *'If you do not like the job, fuck off.'* F claimed this was a dismissal and found himself another job. The company saw it differently: it thought F would come back when over his 'huff' and denied dismissing him. With other fish-filleters' help the tribunal interpreted the words used, not in isolation, but against a background of the fish dock and found the words were not a dismissal but a 'general exhortation to get on with the job'.

46. Whilst I accept that the above example is not binding upon me it is in effect remarkably similar to the circumstances of the present case. Banter and swearing were not uncommon, there was clearly an expectation of Saturday working, everyone else from the back shift had turned up for work on Saturday 16 October 2021 and the fact that the claimant had not previously turned up had clearly caused Mr Campbell to be angry about that fact and he no doubt expressed himself robustly towards the claimant. His words were clearly said in the heat of the moment and in those circumstances it was not reasonable for the claimant to conclude that he was being dismissed by somebody who did not have authority to dismiss him and who was clearly angry for a very specific reason.

47. But not only was it not reasonable for the claimant to conclude at the time, that he had been dismissed by Mr Campbell, it would have been entirely clear to the claimant on 19 October 2021 that he had not been dismissed. There would be no reason for Mr McGregor to send the text message to the claimant that he sent on 19 October had there been a dismissal. I did not accept the claimant's evidence that he did not understand the text message. The claimant kept on insisting in his evidence that he had been dismissed as his reason for not responding to Mr McGregor, but the text from Mr McGregor as a minimum indicated that Mr McGregor did not think that the claimant had been dismissed and had the claimant wished, he could simply have spoken to Mr McGregor and cleared the matter up. But he did not wish to do so indicating to me, as indeed it indicated to Mr Campbell, that the claimant was simply looking for a reason to leave the respondent and that he did not wish to continue working there.
48. In short therefore I find that no words of dismissal were said by Mr Campbell, but even if the words attributed to him by the claimant were said they were ambiguous and given all of the surrounding circumstances it was not reasonable to conclude that those words were words of dismissal. I find that the claimant was not dismissed by the respondent, that by his actions he resigned without giving notice and therefore did so in breach of contract.
49. For those reasons, and in the absence of any claim for constructive unfair dismissal, the claim for unfair dismissal fails and is dismissed.
50. I should just deal with one matter raised by Mr Mitchell in submissions. He indicated that given that the claimant resigned without notice and in breach of contract he ought to face some penalty or pay his week's pay to charity. There was no claim for breach of contract before me and therefore the respondent was not in a position to counterclaim for the claimant's breach of contract. I have no ability to impose a sanction on the claimant in these circumstances and therefore declined to do so.

Employment Judge: Martin Brewer
Date of Judgment: 11 May 2022
Entered in register: 16 May 2022
and copied to parties