



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Dearden

Respondent: Mr I Green

Heard at: Sheffield **on:** 31 May and 1 June 2022

Before: Employment Judge Cox

Representation:

Claimant: In person

Respondent: In person

REASONS

1. The Claimant worked for the Respondent as a passenger assistant on minibuses carrying children with special educational needs to school. The Claimant's job was to ensure that the children were safe as they got onto and off the bus and during their journey to and from school. She worked for the Respondent in this capacity from at least 2005.
2. The Respondent is a sole trader who provides these services to Rotherham Metropolitan Borough Council (RMBC). At the relevant time he had six people working for him: his wife, Mrs Justine Green, who was transport manager, one driver and four passenger assistants, including the Claimant. He also works in the business as a driver and for most of the time the Claimant worked for him, they worked together on the same route. The Claimant is the Respondent's ex-sister-in-law: he was married to her sister from 1981 to 1990.
3. At a meeting on 23 October 2020 the Claimant resigned. Later that afternoon she wrote the firm an email saying: "Justine I don't want to resien I love my job I felt under pressure when I said I feel like I had too find another job. Thank you tina". The Respondent did not respond to that email. The Claimant brought a claim to the Tribunal alleging that she had been unfairly dismissed.

4. At the Hearing of her claim, the Tribunal heard oral evidence from the Claimant, the Respondent and Mrs Green. It was also referred to various documents, including texts and emails, in a Hearing file that the Respondent had prepared. On the basis of that evidence, the Tribunal made the following findings.

Was the Claimant an employee?

5. The Respondent said that the Claimant was self-employed, and not an employee, so she had no right to complain of unfair dismissal. On the evidence it heard, and applying the principles set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, the Tribunal found that the Claimant was in fact an employee. She had agreed with the Respondent to provide her services as a passenger assistant in return for a wage. She was obliged to provide those services personally. She accepted that when providing those services, she would be under the Respondent's control. He was in charge of the bus on which she carried out her duties and he set her hours of work, raised with her if she was late, and expected her to follow the instructions he passed on to her on how RMBC expected the service to be provided. Both parties accepted that he had authority to discipline her in relation to her conduct: when the issues he had with her use of her mobile 'phone came to a head, he issued her with a warning and then, when he believed that she had misused her 'phone again, invited her to a disciplinary meeting. Almost all the other incidents of the relationship were consistent with her being an employee. For example, the Respondent paid the Claimant her normal pay for any short periods of sickness she had.
6. The only evidence that might have supported the Claimant being self-employed was the Respondent's indication to her when she was first recruited that she would be self-employed and his decision to treat her as such for tax purposes. The Tribunal did not accept that that meant the Claimant was in reality in business on her own account, when all the other evidence overwhelmingly indicated that she was working as an employee in the Respondent's business.

Was the Claimant dismissed?

7. An employee who claims to have been unfairly dismissed must show that they have been dismissed in a way that falls within the definition of dismissal in Section 95 of the Employment Rights Act 1996. That includes where the employer expressly terminates the contract but also where the employee resigns in circumstances in which they are entitled to do so without notice because of the employer's conduct. This is known as a constructive dismissal.

Was the Claimant constructively dismissed?

8. In her evidence, the Claimant confirmed that she had resigned because she felt that Mr Green had, without reasonable and proper cause, acted in a way that

was calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. If the Tribunal accepted that that was the case, then that would amount to a constructive dismissal.

9. The Claimant raised various complaints in her claim form about the Respondent's behaviour over the course of her employment, but when asked to clarify what Mr Green had done that caused her to resign, the Claimant confirmed that the two issues for her were these:

9.1 He had asked her inappropriate and intrusive questions about the fact that she had renewed her contact with an ex-partner, Mr Walker.

9.2 He had required her to attend an investigatory meeting on 23 October 2020. She accepted that it was reasonable for him to invite her to the meeting, but she felt pressurised to resign because (i) she had received an anonymous text message on 9 October 2020 that said: "Ian is out to sack you and he reported you watch your self nasty man" and (ii) the meeting was attended by Ms Carrie Ridgeway, the Transport Contract Monitoring Officer for RMBC, whom she had not expected to be there.

Questions about Mr Walker

10. Because the Claimant and the Respondent worked the same route together and the Respondent also picked the Claimant up from her home and dropped her off there at the end of her working day, they had a lot of opportunity to discuss personal matters and they both did so. The Claimant's evidence was that the Respondent started asking her questions about her relationship with Mr Walker in March 2020, when she first received a text from Mr Walker. In her claim form and in the entries in the diary she produced in evidence, she said that she had had her first visit from Mr Walker on 3 July 2020 and that the Respondent asked her about this on 4 July. The Tribunal finds that on or around 3 July the Respondent became aware that the Claimant had begun seeing Mr Walker again.
11. The Tribunal accepts the Respondent's evidence, which was clear and credible, that he did ask the Claimant questions about whether she was re-establishing a relationship with Mr Walker and whether that was a good idea and whether she could trust him. The background to this is that the Respondent had given the Claimant considerable assistance in dealing with the aftermath of her relationship with Mr Walker when they had split up several years before, and had given her substantial practical and financial support in dealing with the debt he left behind him.
12. The Tribunal accepts that the Claimant felt uncomfortable with the Respondent's interest in her relationship with Mr Walker. It also accepts that, in the usual case,

it might be a breach of trust and confidence for an employer to ask an employee questions about her personal life.

13. This was not, however, a usual case. Objectively assessed, the Tribunal does not consider that the Respondent's enquiries about Mr Walker were calculated or likely to destroy the Claimant's trust and confidence in him as her employer. Both she and the Respondent had discussed issues in their personal lives during the course of their working day. They had been related by marriage for several years. Given the investment of time, money and emotion that the Respondent had put into assisting the Claimant when Mr Walker left her, it was understandable that he was concerned that she might get herself back into a situation where she might be treated in the same way again, and she would have known that he was concerned. While she may have found his enquiries intrusive, the Tribunal does not accept that, objectively assessed, they amounted to more than an understandable expression of concern, and were certainly neither calculated nor likely to destroy the relationship of trust and confidence between the Respondent and the Claimant.

The meeting on 23 October

14. In relation to the meeting on 23 October, the Tribunal heard no evidence to link the text of 9 October to the Respondent. Indeed, the Respondent himself received an unpleasant and threatening anonymous text on the same date calling him a "dangerous evil man a back stabber". The Tribunal does not accept, therefore, that the text amounts to conduct by the Respondent.
15. In relation to the presence of Ms Ridgeway at the meeting, the Tribunal finds that the Respondent was objectively justified in wanting a person from RMBC to be there, to explain what the Council expected in terms of the conduct of passenger assistants working on contracts that it had awarded. While the Tribunal accepts that the Claimant felt uncomfortable because of Ms Ridgeway being there, it does not accept that, objectively assessed, her presence was likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.
16. As the Tribunal does not accept that the Respondent acted in a way that was calculated or likely to destroy trust and confidence between himself and the Claimant, the Tribunal does not accept that she was constructively dismissed.

Express dismissal

17. The Tribunal considered whether the circumstances of the case indicated that the Respondent had in fact himself terminated the Claimant's contract.
18. The Respondent's minibuses have CCTV cameras fitted so that RMBC and the police can download a record of how staff have been behaving on the buses. This is a safeguarding measure to ensure that the children's welfare is not at risk.

The Claimant had undergone training as a passenger assistant and safeguarding training, and that training explained that it is not acceptable for passenger assistants to use their mobile 'phone on the bus or share images from their mobile 'phones with the children.

19. In spite of this, the Respondent had repeatedly had to tell the Claimant not to use her mobile 'phone on the bus. When he heard reports of another passenger assistant doing so as well, he sought advice from RMBC. As a result of that advice, on 30 September 2020 he sent all the staff a written reminder that mobile 'phones should not be used while passengers are in the vehicle. That included showing passengers pictures on 'phones. The statement went on to say: "To minimise the risk of misunderstanding arising and safeguard our passengers, can all PAs refrain from using the mobile 'phones whilst in the vehicles, this includes whilst there are no passengers in the vehicles."
20. At the beginning of September 2020, the Respondent had moved the Claimant to a different route, with a different driver, because the route she had been working on with the Respondent had, in the Respondent's assessment, become too difficult for her to manage physically. Because of her fibromyalgia and back problems, the Claimant was unable to deal with the number of passengers' wheelchairs that needed to be secured on this route. (The Claimant has two missing discs and a curved spine as a result of an accident when she was young.) The driver with whom she was now working told the Respondent or his wife that she had used her mobile 'phone while in the vehicle and had had to be asked to end the call as children were approaching to board the bus. The Claimant was given a first written warning on 9 October and told that if her conduct did not improve "or there are any further issues the likely consequence is a final warning and dismissal".
21. The driver told the Respondent or his wife that on their next day at work after the warning letter had been sent, 12 October, the Claimant had called him a backstabber. The Respondent or his wife were also told that the Claimant had shown an image on her mobile 'phone to a passenger. In a letter dated 16 October the Claimant was invited to a meeting to discuss these matters and warned that showing a passenger an image on her 'phone was "a clear breach of safeguarding policy and gross misconduct (safeguarding awareness training has been attended) which could result in termination of your employment."
22. At the meeting, the Claimant admitted showing the passenger an image on her 'phone. Ms Ridgeway asked the Claimant what her ideal outcome from the meeting would be. She said that she did not feel that she could work with the Respondent anymore and would like to resign. Ms Ridgeway asked her at least twice whether she was sure about that and she said she was.
23. Although the Tribunal accepts Mrs Green's evidence that the Claimant appeared calm and even initially aggressive at this meeting, it also accepts the Claimant's

evidence that she felt under pressure. She left the meeting room at around the same time as Ms Ridgeway and, once outside the room, started to cry. Ms Ridgeway asked her to go back into the room to tell Mrs Green how she felt but she said she just wanted to go home.

24. When the Claimant arrived home, she gave her resignation some more thought. She enjoyed her job and needed the income from it. She knew that the Respondent would no longer have an opportunity to question her about her relationship with Mr Walker because he was working on a different route. So she decided to tell the Respondent that she did not want to resign and sent the email mentioned in paragraph 3 above at around 3.45pm, less than two hours after the meeting had ended.
25. In Sothorn v Franks Charlesly and Co [1981] IRLR 278, the Court of Appeal accepted that if an employee uses clear words of resignation, an employer is usually entitled to treat them at face value. In this case, the Claimant used clear words of resignation and repeated her intention to resign at least twice. The Court of Appeal also said, however, that the circumstances might be such that the employer knew, or could reasonably have been expected to know, that the employee did not really intend to resign. In those circumstances, if the employer seizes on the employee's words, which they did not intend, that can amount to an express dismissal.
26. The Tribunal does not accept that those were the circumstances here. The Claimant knew that she was facing a disciplinary sanction. Rather than go through with that, she decided to resign. That was understandable and, in the Tribunal's experience, a fairly frequent occurrence. Very soon after making that decision, she changed her mind. That did not mean, however, that she did not intend to resign when she did so. She had made her intention clear and there was nothing to indicate to Mrs Green that she did not really intend to resign.
27. The Tribunal does not, therefore, accept that the Claimant was expressly dismissed.

Conclusion

28. As the Tribunal does not accept that the Claimant was dismissed, either constructively or expressly, her claim must fail.

Employment Judge Cox

Date: 25 July 2022