EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110818/2021
Hearing held at Glasgow on 6 July 2022
Written submissions provided by parties on 13 & 18 July 2022

Employment Judge: J McCluskey

Mr J Caven	**Claimant** **In person**
M & N Proudlock trading as Mabie House Hotel	**Respondent** **Represented by:** **Ms S Younis** **Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that -

(1) The claim of unfair dismissal is well founded. The respondent is ordered to pay the claimant (i) a basic award of **£7,670.40** (23.5 weeks x £326.40) and (ii) compensation of **£4,498.56** (£4,089.60 plus 10% uplift).

(2) The claim of breach of contract (notice pay) is not well founded and is dismissed.

(3) The claim for failure to provide a statement of written particulars of employment is not well founded and is dismissed.

(4) The claim for holiday pay was withdrawn by the claimant and is dismissed.

REASONS

Introduction

1. A claim was presented on 14 August 2021 in which the claimant made complaints of unfair dismissal, breach of contract (notice pay), failure to provide a written statement of terms and conditions of employment and for payment of accrued but untaken holiday pay. The claims were resisted by the respondent.

2. The respondent led evidence from (1) Robert Proudlock, maintenance worker with the respondent (2) Niki Proudlock; and (3) Malcolm Proudlock. Niki and Malcom Proudlock are married and trade together as Mabie House Hotel. Robert Proudlock is their son. The claimant gave evidence on his own behalf.

3. At the outset of the hearing the Tribunal asked Ms Younis whether Mabie House Hotel, which was named as the respondent on the ET3 response form, was a legal entity. After checking with Nicki and Malcom Proudlock she stated that Mabie House Hotel was not a legal entity. She stated that the employer of the claimant was M & N Proudlock trading as Mabie House Hotel.

4. The ET (Constitution & Rules of Procedure) Regulations 2013 (Tribunal Rules) provide at paragraph 2 of Schedule 1 that the overriding objective of the Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly including, so far as practicable, ensuring that parties are on an equal footing. The Tribunal raised with the claimant that the respondent stated that the correct legal entity of his employer was M & N Proudlock trading as Mabie House Hotel. The claimant stated that he wished to amend the name of the

respondent on his claim form accordingly. Ms Younis did not object to this proposal. The Tribunal determined that it was in the interests of justice to do so. The claimant was unrepresented and did not understand the importance of raising his claim against a legal entity. The Tribunal directed that the name of the respondent be amended to M & N Proudlock trading as Mabie House Hotel.

5. The respondent produced a bundle of documents extending to 68 pages. This had been provided to the claimant. The claimant did not produce any documents at the outset of the hearing. During the course of his evidence the claimant sought to rely on a document which purported to show the date he had commenced employment with his new employer and his earnings with that employer. This had not been produced in a bundle for the Tribunal or provided to the respondent in advance. The Tribunal did not consider that the claimant was being dishonest about not producing the document at the outset of the hearing. Rather, as a layperson, had not appreciated what was meant by the term “document” and what should appear in a bundle.

6. In considering whether to allow the document into evidence the Tribunal considered prejudice to the parties. The respondent’s position was that the document was being produced late in the day. The claimant’s position was that it showed his start date and new earnings. There did not appear to be any particular prejudice to the respondent. By not allowing the document in there would be prejudice to the claimant who would not be able to corroborate his oral evidence about his losses. It would also make the task of the Tribunal more difficult, in particular assessing mitigation of loss, in the event that the unfair dismissal claim was well founded. On balance therefore the Tribunal determined that the claimant should be allowed to refer to this document in his evidence.

7. The respondent also sought to allow a document into evidence which had not been included in their bundle. The respondent sought to do so following conclusion of their case. The document purported to show that the claimant

had undertaken work for third parties whilst on furlough. The respondent' submitted that the purpose of the document was to undermine the claimant's credibility in relation to his evidence about mitigation of his losses. In considering whether to allow the document into evidence the Tribunal considered prejudice to the parties and the lateness of the application. The Tribunal also considered that the respondent had professional representation at the hearing. The Tribunal determined that the application had come too late and it would not be in the interests of justice to allow it. In any event the document did not purport to deal with the claimant's earnings following the date of termination of employment, which was the period which the Tribunal required to assess. On balance therefore the Tribunal determined that the document would not be allowed into evidence.

Issues

8. The respondent identified the following issues for determination by the Tribunal which were agreed by the claimant -

(i) Was the claimant dismissed or did he resign?

(ii) If the claimant was dismissed what was the principal reason for his dismissal and was it a potentially fair reason?

(iii) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

(iv) What basic award and what compensatory award is payable to the claimant, if any? Would it be just and equitable to reduce any award because of any contributory conduct by the claimant and/or any Polkey reduction?

(v) Was there any failure by the respondent to provide a written statement of terms and conditions?

(vi) Was the claimant guilty of gross misconduct such that the respondent was entitled to dismiss without notice pay?

9. The claimant withdrew his claim for holiday pay at the outset of the hearing.

Findings in fact

10. The respondent is Malcom Proudfoot (MP) and Niki Proudfoot (NP) who trade together as Mabie House Hotel. The hotel is a country house hotel situated near Dumfries.

11. The claimant was employed by the respondent as a maintenance worker from 2 March 2003 until 12 May 2021 when he was summarily dismissed. The claimant earned £326.40 gross and £299.20 net per week. At the date of his dismissal the claimant was aged 52.

12. The claimant's wife was a longstanding employee of the respondent. Their two sons also worked for the respondent.

13. In 2011 NP engaged a professional HR consultancy firm. The firm prepared contracts of employment for hotel staff. A copy of the contract of employment was given to all staff. The claimant signed his contract of employment when it was given to him in around 2011. The signed copies of the contracts for staff were saved in a file which NP had to send to insurers. The signed copies have been mislaid by NP.

14. The claimant had a contract of employment. His contract provides for 12 weeks of notice to be given to the claimant. The claimant did not work any period of notice or receive a payment in lieu of notice.

15. The claimant worked with MP for eighteen years. There was a history of the claimant and MP having spoken to each other in intemperate terms and having raised their voices in argument with each other in the past. This had not resulted in any disciplinary action against the claimant.

16. On 11 May 2021 MP found unwashed tools at the outside steps of the hotel where the claimant had been working that day. It was unusual for the claimant to leave tools unwashed.

17. On 12 May 2021 MP noticed that RP had painted two hotel tables with clear paint and a third with oak stain paint. The oak stain paint did not match the other tables in the restaurant.

18. The claimant and RP were both maintenance workers for the respondent. The claimant and RP worked together. The claimant was the senior member of staff between them. The claimant had trained RP.

19. MP had noticed that the claimant was behaving differently in the two weeks prior to 12 May 2021. He wondered if that might be because he knew the claimant was concerned about a medical ailment. He did not ask the claimant about this.

20. On 12 May 2021 MP pulled the claimant up about mistakes which the claimant had made with paint used for hotel tables and about the unwashed tools. The claimant and MP had an argument. The claimant and MP both had raised voices. The claimant and MP argued about the paint and the unwashed tools. The argument between them was heated. The claimant and MP spoke to each other in intemperate terms.

21. During the argument the claimant did not use any clear words of resignation. The claimant did not resign.

22. During the argument MP did not use any clear words of dismissal. MP did not dismiss the claimant during the argument.

23. Immediately after the argument the claimant left the hotel in his car and went home. The claimant did not return to the hotel.

24. Atter the argument MP spoke to his family about what he described as the claimant's outbursts. It came to MP that possibly he did not want the claimant to work with RP, his 20-year-old son, at that time and because of what MP described as previous incidences.

25. MP reached the decision to dismiss the claimant later on the day of 12 May 2021. The claimant's wife also worked at the hotel. Her shift started at 3pm on 12 May 2021. During the claimant's wife's shift she had a conversation with MP. MP said to her "*Jimmy is finished. He won't be back. I have to think of Robert*". MP left a plastic bag beside her car containing the claimant's steel capped work boots and his work tools.

26. The claimant's wife came home from work around 11pm on 12 May 2021. The claimant asked his wife if she had found out what was happening. His wife said to him that MP had said to her "*Jimmy is finished. He won't be back. I have to think of Robert*". She told him that he had left a plastic bag beside her car containing his steel capped work boots and his work tools.

27. MPs words and the act of handing over the claimant's work boots and tools on 12 May 2021 was the summary dismissal of the claimant. The dismissal was communicated to the claimant from his wife on the same date.

28. The claimant phoned the citizens' advice bureau following his dismissal. They advised him to contact ACAS. The claimant contacted ACAS and commenced ACAS early conciliation on 17 May 2021. This is the date shown on the ACAS early conciliation certificate.

29. The decision to dismiss the claimant was made by MP because he had concerns about the claimant working with RP. This decision was made without any disciplinary hearing taking place.

30. The claimant was not informed of his right to appeal against his dismissal. The claimant was dismissed without notice. The claimant did not appeal against his dismissal. He did not believe that in a family business there was anyone who would overturn the decision made by MP to dismiss him.

31. The respondent's failure to comply with the ACAS Code of Practice on Discipline and Grievance was unreasonable. The claimant's contract of employment referred to the respondent's disciplinary rules and procedures. It was unreasonable of the respondent not to have convened a disciplinary hearing prior to the dismissal of the claimant.

32. The claimant was not guilty of gross misconduct. The respondent was not entitled to dismiss without notice pay.

33. Nine weeks after his dismissal the claimant began working part-time with his brother-in-law. He earned £200 per week for this work. The claimant obtained alternative full-time employment on 9 August 2021. His earnings in this alternative full-time employment are higher than in his employment with the respondent. During the period when he was working with his brother-in-law his earnings were £99.20 net less per week than with the respondent. The claimant worked with his brother-in-law for four weeks prior to starting his full-time alternative employment.

34. The claimant was not in receipt of jobseekers' allowance after his dismissal.

Observations on the evidence

35. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those

parts of the evidence which it considered most relevant to the issues it had to decide.

36. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.

37. In relation to the evidence of NP, the Tribunal accepted her evidence that in around 2011 she had engaged a professional HR consultancy firm who prepared contracts of employment for staff. The Tribunal accepted that it was more likely than not that having done so NP would have given staff a copy of the contract of employment and followed up to ensure staff had signed their contract. NP's evidence was that only one person had not signed their contract of employment. Her evidence was that the claimant had signed his contract of employment. The Tribunal accepted that it was more likely than not that NP would remember if any staff members had not signed their contract. The Tribunal accepted that it was more likely than not that the claimant had been given his contract of employment, which he signed.

38. In relation to the evidence of RP, the Tribunal noted that he did contradict himself in relation to whether MP was using a raised voice during the argument with the claimant. His evidence in chief was that he could hear "*raised voices*". In cross examination he stated "*I could hear raised voices for both of you*". During re-examination he changed his evidence to say that only the claimant's voice was raised. The Tribunal was not persuaded by the change in evidence. It appeared to the Tribunal more likely that the claimant had been accurate during his evidence in chief and in cross examination, namely that both MP and the claimant had raised voices during the argument.

39. The evidence of the claimant and MP was contradictory in certain key aspects. The Tribunal has resolved the relevant contradictory evidence as set out below.

40. Having heard evidence, the issue of whether or not there had been a dismissal turned on the subsequent actions of MP after the argument on 12 May 2021 and the timing of those subsequent actions. There were no contemporaneous documents to support the respondent's position that the claimant had resigned from his employment. The Tribunal would have expected that as an employer, the respondent would have a contemporaneous paper trail documenting the position which it asserted to the Tribunal.

41. Based on MP's evidence, the claimant did not use any language during the argument on 12 May 2021 which made it clear to MP that he had resigned. MP said in evidence "*I never knew he had resigned, he basically walked out*".

42. Based on the claimant's evidence, MP did not use any language during the argument on 12 May 2021 which made it clear to the claimant he had been dismissed. The claimant said in evidence that after the argument he went home to his wife. He said "*I think I've been fired over a tin of paint but I'm not sure*".

43. Based on this evidence the Tribunal was satisfied that there had been no dismissal and no resignation during or on conclusion of the argument between the claimant and MP.

44. The next key factual matter which the Tribunal required to determine was the date on which MP and the claimant's wife spoke about the argument which had taken place on 12 May 2021, and on which the claimant's personal work belongings had been given to her. This matter was in dispute between the parties.

45. The claimant's position in evidence was that this happened on 12 May 2021. The claimant's wife came home around 11pm and communicated to him the conversation she had had with MP and the plastic bag she had received with his personal work belongings. She told him MP had said "*Jimmy is finished. He won't be back. I have to think of Robert*" The next day he phoned the Citizens'

Advice Bureau and they advised him to phone ACAS, which he did the following week.

46. The ACAS early conciliation certificate shows that ACAS early conciliation was started the following week, on 17 May 2021 which is consistent with the claimant's evidence about his timing of contacting ACAS.

47. MP's position in evidence was that the plastic bag with the claimant's personal work belongings was handed over to the claimant's wife one week later, on 19 May 2021. MP's position in evidence was that this action was because RP had seen the claimant driving a white van that day. MP inferred from that, he said, that the claimant had resigned. MP's position was that when handing over the personal belongings he had said the claimant would need them on site in his new job.

48. The Tribunal has determined that it was more likely than not that MP gave the plastic bag to the claimant's wife on 12 May 2021. MP's position in evidence was that there was no discussion at all between him and the claimant' wife, about the incident on 12 May 2021 or the claimant's employment position, in the period Wednesday 12 May until Sunday 16 May 2021. That period was the usual working week of the claimant's wife.

49. The Tribunal found this surprising. The claimant was not at work on Thursday 13 or Friday 14 May 2021. It would be surprising if this had not been raised by MP or by the claimant's wife. The claimant and his wife were long standing employees of the respondent. Their sons also worked for the respondent. MP had given evidence (which was disputed by the claimant) that the claimant had walked off site previously but had returned to work on the next working day. That did not happen on this occasion as the claimant did not return to work the following day. MP said in evidence that he did not ask the claimant's wife what was happening as it didn't involve her and she was busy. Even if MP had not raised the matter with her (which the Tribunal does not accept), the Tribunal found it surprising that the claimant's wife would not have raised the matter

with MP, such that a conversation about the claimant's work position would have ensued.

50. Taking these matters into account, on balance the Tribunal considers that it is more likely than not that there was a discussion between MP and the claimant on 12 May 2021, about what had happened and about the claimant's employment. On balance therefore the Tribunal prefers the evidence of the claimant that the discussion between his wife and MP occurred on 12 May 2021 and that MP stated "*Jimmy is finished. He won't be back. I have to think of Robert*". On balance the Tribunal also preferred the evidence of the claimant that his personal work belongings were given to his wife on the same date. MP's words and the action of handing over the personal belongings are consistent with a communication that the claimant was dismissed. The timing is also consistent with the claimant's evidence of having contacted ACAS the following week, as evidenced by the date of 17 May 2021 on the ACAS early conciliation certificate.

Relevant law

51. Section 11 Employment Rights Act 1996 (ERA) References to employment tribunals provides -

> (1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.
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> (2) Where—

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

52. Section 95 ERA Circumstances in which an employee is dismissed provides -

(1) For the purposes of this Part an employee is dismissed by his employer if... —

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)…

53. Section 98 General ERA provides –

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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."

Where the fact of dismissal is disputed, it is for the employee to satisfy the Tribunal on this point, on the balance of probabilities.

54. A dismissal will not be effective until the employee actually knows he is being dismissed (**Gisda Cyf v Barratt [2010] IRLR 1073, SC**).

Submissions

55. The parties provided written submissions. The Tribunal considered both parties submissions in full. Only the respondent's submissions as related to the law have been reproduced here. The claimant's submissions were shorter and are reproduced here verbatim.

Respondent's submissions

56. The law related to dismissal is set out under section 98 ERA. The relevant case-law is **British Home Stores Ltd V Burchell [1980] ICR 303** and I**celand Frozen Foods Ltd V Jones [1982] ICR 17,** and pursuant to section 98(4) ERA. The Tribunal cannot substitute its' own view for that of a reasonable employer. Therefore, even if the Tribunal would not have dismissed the claimant in the circumstances facing the respondent, the question is whether no reasonable employer could have decided to dismiss in the same circumstances. However, the respondent's position is he was not dismissed but he effectively resigned. The claimants account as per his ET1 was not challenged in the cross-examination of MP.

57. The claimant did not show on the balance of probabilities that the incident occurred in the way he described. The claimant did not put his case to MP as per his ET1. As regards the procedure, we submit the Claimant had left the premises not returning to employment and therefore effectively resigning.

58. IDS Employment Law Handbooks on Contracts of Employment provides the following guidance: "11.14…An employee's conduct may sometimes lead to a finding that he or she has resigned. In **Harrison v George Wimpey and Co Ltd 1972 ITR 188, NIRC. 46**. If, contrary to our submission above, the Tribunal finds the dismissal to be unfair and there were failings in the procedure, we submit that the claimant had contributed to his dismissal by his conduct on 12th May 2021. He also failed to contact the respondent, raise an appeal or submit

a grievance. Therefore, he contributed to his dismissal and his conduct was blameworthy **Nelson v BBC (No.2) [1979] IRLR 346 (CA**).

59. The claimant clearly committed a blameworthy conduct on 12th May 2021, and a very serious one at that. We say, for the reasons above, any reasonable employer could have dismissed the claimant instantly on account of a repudiatory breach of contract, breach of trust and confidence in considering the seriousness of the claimant's actions. As indicated in **Mrs M Gokce –vs-Scottish Ambulance Service [2007] UK EAT 0093_06_2808**, particularly at the concluding paragraph, given the severity of the conduct, poor judgment can warrant instant dismissal. The claimant conduct was blameworthy. In the circumstance, it is just and equitable to reduce any award (basic and compensatory) by 100% given the severity of the claimant's behaviour and failure to contact the respondent. There is nothing inconsistent in making a finding of unfair dismissal but awarding no compensation - **W Devis & Sons Ltd v Atkins [1977] IRLR 31 51**.

60. The respondent seeks to rely on **Polkey v AE Dayton Services [1987] IRLR 503** to submit that had a procedure been followed in respect of the dismissal, the outcome would have been the same in that the claimant would have been dismissed in any event. The claimant confirmed in his evidence he did not contact the respondent again. The claimant confirmed in his evidence he did not appeal his resignation or raise a grievance. He had no intention of returning to the employ of the respondent (breakdown of relationship). Any compensation should be reduced to reflect this. The claimant has confirmed on page 12 of the ET1 that he commenced employment on 9th August 2021 earning £400 per week which is more than what the claimant was earning at the respondent. Therefore, there are no ongoing losses.

61. The claimant confirmed he was out of a job for 4 months but also confirmed in oral evidence he also worked for his brother-in-law, 2 days a week which was not declared in the ET1. He earned £200 net a week. The Respondent will say

he obtained work the same week as he was seen driving a white work van. Therefore, no compensatory should be awarded.

62. In terms of notice, the claimant confirmed he did not work the same. Nevertheless, he worked with his brother-in-law for 2 days during this period. No notice was due as per the handbook. Further, the claimant was in breach of contract or gross misconduct. If it is found notice is owed, then this would overlap any compensatory award and the claimant is not entitled to double recovery.

63. If the claimant's unfair dismissal claim fails, then the failure to provide a written statement of terms and conditions of employment. If the unfair dismissal claim succeeds, then the respondent's position is these were provided when Peninsula (HR) was taken on board to draft all the documentation. The claimant gave conflicting evidence in relation to receiving a written statement of terms and conditions of employment. When he was challenged on this point, he stated he never received a contract that he signed. However, NP confirms in evidence all staff were provided a copy when they signed with Peninsula who came in to draft these. She and MP in evidence remember 2011 which corroborates with the year the handbook was drafted. Therefore, it is only plausible the documents were drafted for these to be provided to staff. NP was clear in her evidence as remembering only one other staff member not signing the contract which was not the claimant. The claimant was aware of his holiday entitlement as per the contract. If it is found the claimant was not provided with a contract, then the respondent will submit 2 weeks award is just and equitable. This is not a case where the claimant was dismissed or made redundant. The respondent says the claimant was abusive and aggressive and had left on his own accord. The claimant was the instigator of the situation on 12th May 2021. The claimant did not communicate with the respondent. Therefore, the respondent submits the claimant's claims for unfair dismissal, notice and failure to provide a statement of written terms and conditions of employment should be dismissed.

Claimant's submissions

64. I did admit to giving RP the wrong paint but I did not know he had already painted two tables so it was simple mistake. And l did wash and put away all tools from day before. Times I gave are correct breakfast only lasts until all guests have been served and I only saw one car that day and I spoke to MP that morning and told him I needed concrete that is why the trailer was fitted to the van.

65. MP was in a rage and swearing when he came up to me and he did drop to his knees and pray when he told me to leave, he enjoys mocking me in this way. But I definitely did not throw a shovel at him that would be madness what if l hit him. I left the shovel at the bottom of the stairs where l was working when I saw his van stop and it was never in my hands again. Nor did l throw a bucket at the van or threaten him up to this point. I was still not sure what was happening and my reaction seemed over the top over a tin of paint. According to MP never in all my working life have l ever been accused of aggression at work until now.

66. As for RP he only presents when l was leaving and did not know where l had thrown bucket at van or where van was even parked. As for seeing me in white van in the same week, there is no record with inland revenue of me being employed elsewhere so how could I be insured to drive a work van. It doesn't work that way. As for an unnamed delivery driver who was told by someone else l was working elsewhere that seems farfetched.

67. As for MP calling me boy, MP did not see the guest that day. I tried warn to him but to no avail plus the housekeeper still works there why didn't he get a witness statement from her because she was shocked as me.

68. MP did speak to my wife that day and leave the bag by her car that night. And for that reason only, she believed that I'd been fired. If he had not done that,

she would have made me go back and apologise or made me get another job instead of supporting me financially all those weeks I was out of work as I only did odd day with my brother in-law not every week. Plus, they did not ask my wife for a statement.

69. As for other witnesses I did not see any cars or people in the car park that day. These witnesses have never been named no address or telephone number no statement. And the hotel has failed to provide any proof these people were ever there. I did have good relationships with MP at first but the last couple years he got worse and he could be nasty at times but at 52 coming out of lockdown with a mortgage and two sons. What choice did l have. I didn't know if there were going to be more lockdowns. So, I just had to get on with it. In fact, the chef that been there from the beginning is MP's sister-in-law.

70. I did show frustration giving evidence. But they had peace to give their evidence and all I could hear was respondent behind me. It was difficult to concentrate.

71. Like l said in court the biggest job was grass cutting. MP and RP took care of that. There was not enough work at the hotel for three men. And what happens in winter. MP knew as much if not more than me about work needing done. RP had been fully trained. And they have managed daily tasks on their own for the last fourteen months. That day was a cost-cutting exercise to save paying me redundancy. And if there was enough work for three, why didn't they replace me even part time. Because two was enough.

Discussion and decision

72. It was for the claimant to show that he was dismissed within the meaning of section 95 ERA. There was no suggestion by the claimant that he had resigned and held himself to have been constructively dismissed nor that his employment had ended by virtue of the expiry of a limited term contract. What

required to be proved, therefore, was that the respondent had terminated his contract for the purposes of section 95(1)(a) ERA.

73. The claimant maintained that he was dismissed on 12 May 2021. He led evidence that he was not clear following the argument earlier on 12 May 2021 that he had been dismissed. He understood he had been dismissed in the evening when his wife came home from work. He maintained that his dismissal was communicated to him when his wife told him that MP had said "*Jimmy is finished. He won't be back. I have to think of Robert*" and in giving his wife his steel capped work boots and his tools to pass to him. The next day the claimant phoned the citizens' advice bureau and they advised him to phone ACAS. The claimant did so on 17 May 2021.

74. The Tribunal is satisfied that this is not a case where either the claimant or MP used unambiguous language during the course of their argument on 12 May 2021, which made it clear that there was a resignation or a dismissal. This is supported by the claimant's evidence that he thought he had been sacked over a tin of paint but he wasn't sure. This is supported by MP's evidence that he never knew the claimant had resigned, he basically walked out.

75. This was a situation where there were no direct words of dismissal or resignation on either side at the time of the argument on 12 May 2021.

76. The respondent maintained that the claimant's resignation could be inferred from his actions. The respondent maintained that the claimant had walked out before and returned the following working day. He did not return on this occasion. The respondent maintained that on 19 May 2021 RP saw the claimant driving an unmarked white work van in town. MP maintained that he understood that to mean the claimant had another job and was not returning. MP maintained that he treated that as inferring a resignation by the claimant.

77. MP said in evidence that he gave the claimant's personal belongings to the claimant's wife in a plastic bag on 19 May 2021 saying the claimant would need

them to go on site as he had found another job. MP maintained that thereafter on 21 May 2021 a supplier told MP that the claimant was working elsewhere.

78. The Tribunal considered whether on the claimant's case there was an express dismissal, falling within S.95(1)(a) ERA.

79. In **Sandle v Adecco UK Ltd 2016 IRLR 941, EAT**, the EAT made the point that communication is key. A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer.

80. The Tribunal directed itself to the guidance in **Sandle**, that a dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. The Tribunal was satisfied that the claimant's dismissal was by words and deeds, the words being "*Jimmy is finished. He won't be back. I have to think of Robert*"" and the deed being the handing over of the plastic bag with personal work items. The Tribunal was satisfied that an objective observer would understand that action to mean that the claimant's employment with the respondent was terminated.

81. The Tribunal also directed itself to the guidance in **Sandle** about communication and that a dismissal can be inferred from an employer's actions only if the employee was made aware of the conduct in question. The Tribunal was satisfied that the claimant was made aware of MP's words to his wife and the handing over of his personal belongings when his wife got home that evening and told him.

82. The Tribunal was satisfied that it was reasonable of MP to expect that what was said by MP to the claimant's wife would be passed on by her to the claimant.

83. Given the Tribunal's finding that the conversation between MP and the claimant's wife took place on 12 May 2021 and that the personal belongings were handed to her on that day, the Tribunal is satisfied that it is more likely than not that MP said to the claimant's wife on that date "*Jimmy is finished. He won't be back. I have to think of Robert*". It is not likely that MP would have handed over the personal belongings on that date without any explanation. It is more likely than not that MP would have provided the explanation advanced by the claimant. That explanation also chimed with the evidence of MP when he was asked by the Tribunal why he had not got in touch with the claimant. MP stated that "*We spoke about his outbursts as a family and it came to me that possibly I did not want him to work with my 20-year-old son at that time and because of previous incidences"*.

84. As the Tribunal's finding is that the conversation between MP and the claimant's wife took place on 12 May 2021, the explanation provided by MP could not have been that the claimant would need his personal belongings for his new job. This is because the evidence of the respondent was that RP only reported that the claimant had been seen driving a white van on 19 May 2021.

85. Having regard to all the relevant circumstances, including the communication by MP to the claimant's wife and the facts which have been found in relation to events before on and after the argument on the morning of 12 May 2021, the claimant has shown, on balance, that the respondent summarily terminated his contract of employment on 12 May 2021.

86. It is now necessary to consider whether the claimant was unfairly dismissed.

87. In terms of section 98(1) ERA it was for the respondent to show the reason (or, if more than one, the principal reason) for the claimant's dismissal. The reason advanced by the respondent of gross misconduct was disputed by the claimant. According to the claimant, the reason for his dismissal was a cost cutting exercise and that the respondent had wished to avoid making a redundancy payment to him.

88. Having considered all the evidence before it, the Tribunal was persuaded that the principal reason for the claimant's dismissal related to his conduct. MP had told the claimant's wife that the claimant was finished and would not be back and that MP needed to think of his son RP. The claimant worked as a maintenance worker with RP. MP made reference in evidence to what he called the claimant's outbursts and that he possibly did not want the claimant to work with his son RP at that time and because of previous incidences.

89. MP had witnessed the claimant raising his voice to him and speaking to him in intemperate terms on 12 May 2021, and on previous occasions. MP said of the claimant that he had "*pulled him up*" for mistakes which the claimant made with the paint and with the unwashed tools. MP considered that he was entitled to pull him up. The Tribunal was satisfied that the decision taken to dismiss the claimant was because of his conduct and not because of cost cutting. The principal reason for the claimant's dismissal related to his conduct.

90. Conduct is a potentially fair reason for dismissal in terms of section 98(2)(b) ERA. The respondent having met the requirement to show that the claimant was dismissed for a potentially fair reason, the Tribunal went on to consider whether the dismissal was fair or unfair having regard to the claimant's conduct. In terms of section 98(4)(a) ERA, this depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking), the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. This must be determined in accordance with equity and the substantial merits of the case in terms of section 98(4)(b) ERA.

91. When considering whether the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him, the Tribunal must have regard to whether the decision to dismiss fell within the "band of reasonable responses" of a reasonable employer. It is not for the Tribunal to consider how it would have responded to the claimant's conduct. It

must consider whether a reasonable employer might reasonably have dismissed the claimant in response to his conduct.

92. Whether the respondent acted reasonably or unreasonably will depend on the circumstances of the case. Applying the authority of **British Home Stores Ltd v Burchell 1980 ICR 303**, this involves the Tribunal being satisfied that (i) the respondent believed that the claimant was guilty of the misconduct for which he was dismissed; (ii) the respondent had in mind reasonable grounds upon which to sustain that belief and (iii) at the stage at which the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

93. The Tribunal was satisfied that MP believed the claimant had raised his voice to him in response to MP pulling up the claimant for mistakes with the paint and unwashed tools. MP believed that there had been previous occasions when there had been unwarranted outbursts from the claimant. This was clear from his evidence before the Tribunal. MP's belief was based on the claimant's conduct on 12 May 2021 and on previous occasions. While the Tribunal did not doubt that MP believed the claimant's raised voice and outbursts were a concern, it was not persuaded that at the time he formed that belief the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances.

94. The Tribunal concluded from the evidence before it that MP had already decided to dismiss the claimant by the time he met with the claimant's wife on 12 May 2021. MP had noticed that the claimant was behaving differently since returning from furlough. He wondered if that might be because of a health reason but did not ask the claimant about this. When the claimant left the hotel after the argument on 12 May 2021 MP did not contact him or attempt to carry out any investigation with the claimant. MP did not carry out any investigation with the claimant before reaching his decision to terminate the claimant's

employment and communicate this to the claimant via his wife the same day. There was no opportunity provided to the claimant to challenge his dismissal.

95. The Tribunal found that, applying the test in **British Home Stores v Burchell**, the respondent had not acted reasonably in their dismissal of the claimant. MP had already decided that he was concerned about the claimant's conduct before a reasonable investigation had been carried out and which should have included allowing the claimant a reasonable opportunity to challenge his alleged misconduct. This did not occur.

96. The Tribunal also found that respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. The Tribunal was not persuaded that summary dismissal fell within the "band of reasonable responses" of a reasonable employer. In his evidence before the Tribunal, MP described being concerned about his son working with the claimant given his outbursts. He also said to the claimant's wife, when communicating the claimant's dismissal, that he had to think of his son.

97. There was no evidence of any previous disciplinary action against the claimant in relation to his outbursts. The Tribunal did not doubt the claimant's conduct in raising his voice, even when MP was doing the same, may not be an appropriate way for an employee to engage with his manager. Viewed objectively however, the Tribunal was not persuaded that the claimant's conduct was a sufficient reason to justify summary dismissal. In all the circumstances, the Tribunal concluded that the claimant was unfairly dismissed by the respondent.

Remedy

98. The claimant sought an award of compensation. He is entitled to a basic award which is based on his age at the date of dismissal (52), length of service (18 years) and weekly pay (£326.40 gross). This amounts to £7,670.40 (23.5 weeks x £326.40).

99. The claimant was summarily dismissed and did not receive any notice pay. The claimant's losses for the purposes of compensation run from the date of dismissal until 9 August 2021 when he secured alternative full-time employment. The claimant's earnings in his alternative full-time employment are greater than his earnings with the respondent. He has no ongoing losses from 9 August 2021.

100. The claimant obtained alternative full-time employment thirteen weeks after his dismissal. The claimant's is entitled to a statutory notice payment of twelve weeks net earnings. He did not receive this. HIs net weekly earnings were £299.20. The claimant is entitled to claim notice pay in full despite having found some paid employment during what would have been the twelve weeks' notice period. The amount due for his twelve weeks' statutory notice period is £3,590.40 (12 weeks x £299.20). Thereafter, in the week prior to commencing his alternative full-time employment on 9 August 2021 the claimant earned £200 working with his brother-in-law. His losses in that week amounted to £99.20 (£299.20 - £200).

101. The compensation award can take into account the fact that the claimant will be unable to bring another unfair dismissal claim until he has had two years' continuous employment in a new job. The Tribunal considers that an award of £400 for loss of statutory rights would be just and equitable in all the circumstances.

102. The claimant is entitled to a compensatory award of **£4,089.60** (£3,590.40 plus £99.20 plus £400).

103. The respondent submitted that any award of compensation should be reduced in accordance with the principle in **Polkey v AE Dayton Services Ltd 1988 ICR 142**. The Tribunal was not persuaded in all the circumstances of this case that a Polkey deduction would be just and equitable. The claimant's dismissal was found to be unfair because summary dismissal was outside the "band of reasonable responses". The decision to dismiss because there were concerns

about the claimant working with RP was made without any disciplinary hearing taking place. This was not a case in which the Tribunal was satisfied that it was possible to conclude that but for procedural irregularities the claimant would have been fairly dismissed in any event.

104. The claimant did not appeal against his dismissal. The respondent submitted that this was a failure by the claimant to comply with the material provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures (Code of Practice) and that accordingly any award of compensation should be reduced in terms of Section 207A(3) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA). In terms of paragraph 26 of the Code of Practice, where an employee feels that disciplinary action taken against them is wrong or unjust, they should appeal against the decision. It was the claimant's position that there was no point in appealing against his dismissal. He did not believe that there was anyone in the respondent's business who would overturn the decision made by MP to dismiss him. Furthermore, the respondent did not consider that there had been a dismissal.

105. In all the circumstances of his dismissal the Tribunal did not consider the claimant's position to be unreasonable. The respondent's position was that the claimant had resigned. It did not consider that there was a dismissal to be considered on appeal. The Tribunal did not agree with the respondent that the claimant failed to appeal because he did not feel that his dismissal was wrong or unjust. In all the circumstances, the Tribunal was not persuaded that it would be just and equitable to reduce the compensatory award made to the claimant to reflect his failure to comply with the Code of Practice.

106. The Tribunal also considered whether there was a failure by the respondent to comply with the material provisions of the Code of Practice, that any such failure was unreasonable and that accordingly any award of compensation should be increased in terms of section 207A(2) TULRCA.

107. In terms of paragraph 4 of the Code of Practice employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. The Tribunal considered that the respondent's failure to comply with the Code of Practice was unreasonable. It was unreasonable of the respondent not to have informed the claimant of the basis of the problem and given him an opportunity to put his case in response before any decision was made The Tribunal was persuaded that it would be just and equitable to increase the compensatory award made to the claimant by 10% to reflect the respondent's failure to comply with the Code of Practice. The amount of the compensatory award is £4,498.56 (£4,089.60 plus 10% uplift).

108. In terms of section 122(2) ERA where the Tribunal considers that any conduct of the claimant before the dismissal 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. The Tribunal was persuaded that the claimant spoke to MP in intemperate terms. He did so however at a time when MP also spoke to him in intemperate terms. The claimant had worked with MP for eighteen years. There was a history of them having spoken to each other in intemperate terms in the past which had not resulted in any disciplinary action against the claimant. In all the circumstances the Tribunal decided that it was not just and equitable to reduce the basic award. The total basic award made to the claimant therefore totals £7,670.40.

109. In terms of section 123(6) ERA where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. The Tribunal was not persuaded that the claimant caused or contributed to his dismissal. The Tribunal was persuaded that the claimant spoke to MP in intemperate terms. He did so however at a time when MP also spoke to him in intemperate terms. The claimant had worked with MP for eighteen years. There was a history of

them having spoken to each other in intemperate terms in the past which had not resulted in any disciplinary action against the claimant. In all the circumstances the Tribunal decided that it was not just and equitable to reduce the compensatory award. The total compensatory award made to the claimant therefore totals £4,498.56 (£4,089.60 plus 10% uplift).

110. The Tribunal concluded that in all the circumstances of the case the claimant was unfairly dismissed by the respondent and should be awarded £12,168.96 (basic award of £7,670.40 and compensation of £4,498.56).

Breach of contract (notice pay)

111. The claimant was summarily dismissed. His dismissal was unfair. He did not receive a payment in lieu of notice. His losses in this regard are included within the award of compensation for unfair dismissal. His separate claim for breach of contract (notice pay) is not well founded and is dismissed.

Failure to provide statement of written particulars of employment

112. In relation to the evidence of NP, the Tribunal accepted her evidence that in around 2011 she had engaged a professional HR consultancy firm who prepared contracts of employment for staff. The Tribunal accepted that it was more likely than not that having done so NP would have given staff a copy of the contract of employment and followed up to ensure staff had signed their contract. NP's evidence was that only one person had not signed their contract of employment. Her evidence was that the claimant had signed his contract of employment. The Tribunal accepted that it was more likely than not that NP would remember if any staff members had not signed their contract. The Tribunal accepted that it was more likely than not that the claimant had been given his contract of employment, which he signed. The Tribunal concluded that the claimant had been provided with a statement of written particulars of

employment. The claim for failure to provide a statement of written particulars of employment is therefore dismissed.

Employment Judge: **J McCluskey**
Date of Judgment: **9 August 2022**
Entered in register: **10 August 2022**
and copied to parties