EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr J. Davie	**Aramis Rugby Ltd**
Held at: Exeter	**On: 24 August 2022**

Before: Employment Judge Smail

Appearances
Claimant: In Person
Respondent: Mr V. Mahajan (Director)
Mrs R. Mahajan (Manager)

JUDGMENT having been sent and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 3 January 2021, the claimant claims automatic unfair dismissal. He was employed by the respondent between 10 August 2020 to 5 October 2020, alternatively 17 October 2020. He claims the reason or principal reason for his dismissal was that contrary to Section 100 (1) (c) of the Employment Rights Act 1996, being an employee at a place where there was no health and safety representative or committee, he brought to his employer's attention by reasonable means, circumstances connected with his work which he believed were harmful or potentially harmful to health or safety. Specifically, he says that in a meeting on 5 October 2020 with Mrs Roshni Mahajan, Manager and Mr V Mahajan, Director, he raised the unsafe nature of welding at the respondent. In his witness statement he says he raised (1) noise and earplugs (2) gloves (3) soap and cleansing of hands (4) fumes and extraction fans (5) the inadequacy of the existing crane for lifting heavy metal objects.

2. This case then turns on a question of fact: was the reason or principal reason for the Respondent's termination of the employment relationship that the

Claimant had raised matters of health and safety on 5 October 2020. If so, the dismissal was automatically unfair.

3. The respondent makes and sells rugby equipment. This includes scrummaging machines. These are made out of metal. Suppliers supply the metal and this has to be welded to make the machines.

4. At the time of the claimant's engagement the welding was being performed by Hugh Marshall Sims, who had come out of retirement to work for the respondent on a self-employed basis.

5. The claimant answered an advert to work in telesales. He was recruited initially to perform that role. He started work on 10 August 2020, on a trial basis. His commitment increased to the respondent and he increased his days and hours. He is a rugby man himself and he was keen to work for this well-known rugby equipment company. He had some background in car mechanics. He asked if he could do some welding. The respondent was keen for him to broaden his skills. Mr Marshall Sims wanted to return to retirement and the respondent saw the opportunity of training up one of its employees to perform the role.

6. I accept from the respondent they asked Mr Marshall Sims to assess the claimant's welding skills. He advised that the claimant would need to learn to be a welder. He was happy to help train but the claimant would have to take some welding qualifications. The respondent agreed with the claimant that they would fund welding training for him at Petroc College in Tiverton.

7. There has been a dispute between the parties about how much welding the claimant did after this trial. I have been unable to take each side completely at its word in what each side has said to me because each side has been tempted to exaggerate its own position for the purposes of this hearing.

8. I find that it is right that the claimant performed welding under the supervision of Mr Marshall Sims, when Mr Marshall Sims was there. The claimant did more welding then just on the day of his trial. He did not do any welding however, when Mr Marshall Sims was not there. The respondent would not have allowed this until he became qualified. That if he was to weld, the need for obtaining a qualification was expressly recognised in the draft contract of employment that was put to him. He had asked for a contract to regularise the position. The welding is at section 7 of the draft contract, in these terms:

> "As you have shown interest in learning welding-related skills during office hours, this involves additional financial commitment from the employer and thus the following conditions will apply:
>
> 7.1 During the restricted period, if you wish to end your employment an employer will be entitled to recover two months salary from the employer's part remuneration for investment made towards helping you learn new skills.
>
> 7.2 You may not work on learning any welding related skills/work without the express agreement from a director or his/her authorised representative.

7.3 The day and duration thereof you spend on learning new skills will be decided by the employer at its sole discretion and must be sanctioned by the employer before you can carry out any such learning activities.

7.4 Any breach of these conditions will form basis of consideration under gross misconduct proceedings as laid out in Section 11 below."

9. The claimant objected to the Clause. The restricted period was defined as two years at Clause 1.5. He also objected to other aspects of the contract. The second aspect was that the commencement date was specified as being 1 September 2020 when actually his continuity stretched back to 10 August. There was also a significant list of matters that might amount to gross misconduct. At Clause 3 use of personal electronic devices was dealt with, thus:-

"The use of personal devices including but not limited to mobile phones is not allowed and all personal mobile phones must be switched off during office hours. You may forward the office landline number to your family for emergencies".

10. Prohibited Activities:

"Use of internet and/or WI-FI for personal use, including but not limited to social media, e.g. Facebook, Messenger, internet browsing/shopping emails, gaming YouTube. Abuse of company equipment including records, computers, email or internet files and documents and client documents and files."

11. The claimant had in the course of his brief employment with the respondent been challenged about the amount of time he was on his phone. On 5 October 2020 the claimant became very upset with the respondent for a number of reasons, one of which was that after discussions about the contract, he had retired to his room and his computer and the respondent had noted that he had been looking at job adverts. He maintains this was in his spare time and he was looking at job advert not for him but for his stepson. The claimant was convinced that the respondent should not be monitoring his computer use in this way and he believed that the respondent could see what he was looking at on his computer from the office, which was elsewhere in the building. Mr V Mahajan, the director, is an IT Specialist. It seems likely that the office could and did monitor what its employees were looking at. This caused the claimant a significant degree of upset. He felt violated.

12. This incident followed the discussion that the parties had about the proposed contract. The claimant was not happy to sign the two year penalty clause to the effect that, if he left within that time, he would have to pay two months salary in respect of training. I accept from Mrs Mahajan that there had been discussions that day and previously whereby the claimant had indicated he was not in a position to promise two years service to the respondent. He did want to be trained in welding but he felt he could not be tied in with the respondent for two years. He had been looking at opportunities also closer to home. There is a twelve mile distance between his home in Barnstable and South Molton, where the respondent is based.

13. The claimant was unhappy that day. He had been monitored in his computer usage which he felt was a violation and he was unhappy with the draft contract that had been put to him. Did he also on that day raise matters of health and safety?

14. It is instructive perhaps to look at the WhatsApp messages that were exchanged following the outcome of the event of 5 October 2020. The claimant was not happy on 5 October 2020, as we know. The parties agreed, I find, that the Claimant would leave the job for a period whilst the claimant considered his position. He would be unpaid in that period. It would be open to him to approach the company again with a view either to restarting or to be re-engaged.

15. The respondent has placed reliance on an email from accountants which suggests that a P45 and final payslips were sent on the 6 October 2020. Although the claimant had not unequivocally resigned on 5 October 2020, payslips and a P45 were made up to ending on 6 October. I approach the communication from the accountants with some caution. They have not exhibited the original documentation that was sent. The documentation might have been backdated. The Accountants have not appeared before me today. It is likely that the claimant did leave on 5 October 2020 in a disturbed state; he was not happy with the respondent and he and the respondent had agreed that he could leave for a period to consider his position.

16. Was that state of affairs generated by reason of matters of health and safety that the claimant claims he raised? It is instructive to look at the WhatsApp communications. 16 October 2020 from the claimant to Mrs R Mahajan.

> "Good afternoon Roshni, I hope everything is ok. Is it ok to come in on Monday to have a chat and to hopefully move forward?"

17. There was a phone call on or around this time. I find that it is likely that the claimant did also telephone on 16 October 2020 to backup his enquiry as to whether there was a chance of remaining, albeit on his terms at the respondent. It is likely he did this because he was making enquiries about covid and furlough, common concerns of employees over this period.

18. Mrs Mahajan replied to the WhatsApp message on 17 October 2020 at 16:08.

> "Hi Josh, thanks for your message, hope you are well. Rugby is at a stand still so no sales are happening. It would not be appropriate for us to promise you something that we both cannot sustain. Hopefully things will get better in January 2021 and I will call you myself to make an offer. That is if you are interested in joining Aramis then. This has nothing to do with you but the way this pandemic has affected all of us, especially the latest lockdown restrictions. I wish you all the luck and will get in touch with you in the new year. Regards Roshni".

19. The claimant replied on 17 October 2020 at 16:59 and there were three further messages at 17:00. He wrote:

> "Hi Roshni, thank you for finally getting back to me. I thought when we agreed to take a break that my job was still secure and I could come back at any time? If that is not the case, there are a few things that I need sorting out before we do part ways. Firstly, my final pay cheque is a bit light; if I started working for Aramis on 10 August (like I did) I would be entitled to more holiday pay than I received. Also, I did come into work on that Monday morning if only for a couple of hours. Secondly, I have not had any copy of the report that should be in your accident book for the injury I sustained while working for you. I have talked to people and they have assured me that you do not need copies of my hospital records, as they are confidential, to complete entry into your accident book you should by law have at your premises".

20. That was not a welding injury it was a piece of dirt that fell into his eye as he was carrying products. Thirdly, he continued

> "I have also spoken to my cousin who is a solicitor and she has told me that what you did involving mirroring my computer and spying on me is completely illegal. I thought it was at the time, and I was utterly shocked and saddened at your behaviour."

21. Finally, he continues

> "Ultimately sacking me because I pointed out a few health and safety issues that I have seen was illegal in itself. To sweep all the issues I raised to say just don't go anywhere noisy or always wear clothes, even though that is ultimately impossible, is ridiculous in itself. These issues should have been sorted and I should not have lost my job as a result of this. I know from speaking to ACAS in the past that talking directly is my first port of call before proceeding any further. If you could respond to this message as soon as possible and sort the issues I would greatly appreciate it. Regards Josh."

22. A minute later he sent to Mrs Mahajan guidance on whistleblowing for employees and guidance on workers health and safety and said he had also included links to websites that show what he was saying is true. He plainly had done some preparation for this exchange of WhatsApp messages. He decided to raise issues and make allegations about whistleblowing and health and safety.

23. There was no reply on the 17th and on 21 October 2020, the claimant pushed for a response. Mrs Mahajan replied

> "Josh please do not send me threatening messages. The employment contract offered was refused by yourself. You have misused the office equipment and internet for personal use despite this being pointed out repeatedly. There might have been a possibility of having a fresh dialogue in the future but your highly unprofessional and intimidating messages have put an end to that. All monies due to you have been calculated by our accountant and the final payslip and P45 have been already sent to you. I wish you best of luck for your future. Regards Roshni."

24. The claimant replied - and this is the last communication with no further communication from the respondent -

> "As I mentioned in my messages. I would like to sort this without taking this further. I don't know how I misused office equipment or internet. I have nothing telling me I was not allowed to use the internet in my personal time. Mirroring my computer is completely illegal and a total breach of my own confidentiality. All monies have not been paid to me as your accountant had the wrong information as to my start date. I started on 10 August 2020 and not 1 September 2020. This is one of the reasons why I wanted that change in the contract you offered. I have been nothing but professional during this dialogue, offering to resolve these issues with you before heading straight to a solicitor. You have just shown me your unprofessional side by calling me unprofessional and intimidating. Ending my employment after seven weeks of employment due to me bringing up some health and safety issues is completely illegal as well. I am very saddened by how this is turned out and if I do not see the situation moving forward by the end of today, I will be getting in contact with my solicitor."

25. Did the claimant raise matters of health and safety on 5 October 2020 sufficient for that to generate a reason or the principal reason for the respondent to terminate the relationship? I find it significant that his witness statement is far more detailed as to what he claims to have raised rather than

the WhatsApp messages. In the WhatsApp messages he mentioned only a few health and safety issues he said "To sweep all the issues I raised to say just don't go anywhere noisy or always wear clothes, even though that is ultimately impossible, is ridiculous in itself" to my mind, does not raise a sufficient severity of allegation of compromise of health and safety to motivate this respondent to consider terminating the agreement. If he did raise the issues of health and safety, they were along the lines of his WhatsApp message, which in my judgement would not have led the respondent to think that they were being challenged seriously about matters of health and safety.

26. I accept what Mr and Mrs Mahajan tell me that they did not know that health and safety was being thrown at them until they got the WhatsApp message of 17 October 2020. It did not figure seriously in their discussions on the 5 October 2020. What did seriously arise on 5 October 2020, were two matters in particular: first, the claimant's unwillingness to expose himself to a two month salary penalty clause if he were to leave in two years. He could not commit himself to this business for two years. He was not prepared to do that. Secondly, he was also very upset - and he may well have very good reason for this - about the fact that his computer usage was being directly monitored by the respondent.

27. That led him to leaving on 5 October 2020 against an understanding of being able in the fullness of time, if he so wished, to make further contact. He did that on 16 October 2020 but on that day on the telephone, or at latest, on 17 October 2020 at 16.08, the respondent decided it had no further work for the claimant.

28. Why did they decide that? In my view, they decided that because the Claimant would not sign the contract that they had prepared, protecting them against the training cost, should they train him up to be a welder and should he leave within the two years. For them that was a matter they were not prepared to compromise on. I have heard Mr and Mrs Maharaj on this and I accept their evidence.

29. In my judgement the respondent did dismiss the claimant. My primary finding is that they effectively did so on 5 October 2020 because he would not sign the contract. If I am wrong about that, they certainly did dismiss on 17 October 2020 at 16.08 in the message from Mrs Mahajan. The reason or principal reason for this was not health and safety, however.

30. Whilst the claimant had raised some matters of health and safety, I find that the respondent shows that it was not raising matters of health and safety that caused them to terminate the relationship; the reason or principal reason was because the Claimant would not sign the contract in respect of the welding training costs. The matters of health and safety he raised did not represent a challenge to the Respondent such that they might act negatively on it. I accept that the Respondent did not know they were being challenged about health and safety to any significant degree until after Mrs Mahajan's email of 17 October 2020 at 16.08.

31. Whilst in many respects this is an unfortunate history because the claimant as a rugby man hoped to have a rewarding future with the company, circumstances in respect of the training penalty meant that this relationship

could not proceed productively. The reason why the employer ended this relationship was because the Claimant would not sign the contract.

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Employment Judge Smail
Date: 7 November 2022

REASONS SENT TO THE PARTIES ON
14 November 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE