



EMPLOYMENT TRIBUNALS

Claimant: Mr W Aitchison

Respondent: Stevens Equipment Rental Limited

Heard at: Manchester (via CVP)

On: 30 & 31 October 2023

Before: Employment Judge Shergill
(sitting alone)

Representation

Claimant: Mr A Williams (counsel)

Respondent: Mr. D James (solicitor)

RESERVED JUDGMENT

1. The claim for unfair dismissal on grounds of redundancy or otherwise brought under the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The claim for failure to provide written particulars of employment under section 38 of the Employment Act 2002 is not well-founded and is dismissed.
3. The claimant resigned on 08/03/2023 and was not made redundant, as such the claims relating to breach of contract or notice pay are dismissed.

REASONS

Introduction

1. Mr Aitchison ('the claimant') worked for the respondent as a dump truck driver. He worked at various client sites, away from home and subject to local control by the client to whom he was assigned. He worked for the respondent for a number of years, though the start and end dates of employment were in dispute. He claims to have been unfairly dismissed and/or made redundant. The respondent accepts that the claimant was employed by them, but states that the claimant resigned. It is alleged he did

so in order to take a more lucrative self-employed contract (which meant he was assigned to the respondent company through an umbrella company). Aside from the employment status being accepted (and there being no issue of time limits) all other matters were in dispute.

The Hearing

2. The hearing was conducted remotely. The Tribunal heard evidence from the claimant on his own behalf; and two witnesses for the respondent. They were Paul Morrison ('PM') who was the general manager and Andrew Stevens ('AS') who was the managing director. I had regard to an agreed bundle of documents of 322 pages, and the witness statements of all three witnesses. There were additional documents uploaded and referred to, though I only relied on the ones I was taken to in the hearing or otherwise referenced in my decision making below.
3. The bundle had to be emailed at the start of the hearing due to issues with the online portal. This led to a late start in hearing live evidence. There were no issues that could be narrowed due to the contested nature of the case.
4. As the general manager, PM dealt with the claimant on a day-to-day basis. He gave evidence at the end of day one. Some 30 minutes after the hearing ended, he provided the solicitors with a PDF document entitled 'daily emails'. He had referred to such emails he had sent in relation to finding work for the claimant in his live evidence. The solicitors forwarded that to the tribunal and the claimant's representatives. On day two, there was an application by Mr James for that evidence to be admitted which was resisted by Mr Williams. I decided to admit the evidence for the reasons announced in full during the hearing. In short, I decided the evidence was in breach of directions but was relevant to matters which filled a lacuna in the timeline to the case. I decided rule 2 was not offended and that there were applications Mr Williams could make, if required, to cure any unfairness. No further applications were made. The case proceeded for the full reasons set out in the record of proceedings.
5. The contested nature of the case and the late admissibility of evidence led to PM being recalled by Mr Williams for further cross-examination on the content of the 'daily emails'. All these factors led to little time being left for proper consideration of a decision on the day, so the decision was reserved on liability only, with a view to a further hearing for quantum, if required.

The Issues

6. There were no issues as regards employment status or time limits. The live issues to determine were in relation to:
 - 6.1.1 What was the start date of the employment?
 - 6.1.2 Did the respondent provide written particulars of employment?
 - 6.1.3 Was the claimant dismissed by the respondent, or did he resign?
 - 6.1.4 What was the effective date of termination?
 - 6.1.5 Was any dismissal on the grounds of redundancy?
 - 6.1.6 Was there a breach of contract/unfair dismissal?
 - 6.1.7 Is the claimant entitled to any notice or holiday pay?

Relevant Legal Principles

Was there a dismissal?

7. In cases where there is a disagreement about whether there has been a dismissal, or resignation, the first matter to determine is what words were used, and whether those words were ambiguous or unambiguous.

Ambiguous words

8. The test as to whether ostensibly ambiguous words amount to a dismissal is an objective one, all the surrounding circumstances (both preceding and following the incident) and the nature of the workplace in which the relevant circumstances arose must be considered. The tribunal must ask itself how a reasonable listener (i.e. employer or employee) would have construed the words in all the circumstances of the case. The intention of the speaker is irrelevant; and so to, is the listener's understanding of what was said – **B G Gale Ltd v Gilbert [1978] IRLR 453** and **Sothorn v Franks Charlesly & Co [1981] IRLR 278**. Where there remains ambiguity, it should be construed against the person who relies on it.

Unambiguous words

9. The line of caselaw relating to resignations by use of unambiguous words has been clarified in **Willoughby v CF Capital Ltd [2011] IRLR 985**. The position can be summarised that, where unambiguous words are used, a tribunal must start with a subjective test, that the words used can be taken at face value. However, there may be special circumstances (such as high emotions, or words said in the heat of the moment) which militate against such construction.

Resignation

10. A resignation is the termination of a contract of employment by the employee. The contract will not actually come to an end until the employee has communicated their resignation to the employer, either by words or by conduct — **Edwards v Surrey Police 1999 IRLR 456, EAT**. However, a resignation need not be expressed in a formal way and may be inferred from the employee's conduct and the surrounding circumstances — **Johnson v Monty Smith Garages Ltd EAT 657/79**.

Reason for dismissal

11. Dismissal takes place at the moment that the decision to dismiss an employee is communicated, and it cannot be unilaterally rescinded. The respondent disputes that there was a dismissal and says that the claimant resigned. If the tribunal concludes that the claimant was dismissed, it must be for a potentially fair reason under s98 of the Employment Rights Act 1996 ("ERA"). The key legal requirements are: a) it is for the respondent to show on balance that the claimant was dismissed for a potentially fair reason; and b) the question of whether the dismissal was fair or unfair depends on whether in the circumstances the employer acted reasonably.

12. In this case, the claimant argues that the reason for dismissal was redundancy because of what he was told by PM, hence his claim for a redundancy payment. The definition of redundancy is found at s139 ERA and sets out the situations where redundancy arises, in essence that the work or a business is ceasing or has ceased; or work that the claimant carried out, has or will diminish.

Submissions

13. Mr. James set out the key legal principles that I had to apply, he summarised the grounds relied on to show that the claimant resigned rather than being dismissed, including discrepancies in his pleaded case and evidence on various issues. He submitted there had been a considerable change in the claimant's position. He set out the reasons why the claimant was employed under a 'zero hours contract' and that the respondent's case was that employees could be without work in between assignments for clients. A particular feature in this case was that due to the time of the year there were only two clients hiring plant with drivers. Both of those clients had refused to engage the claimant due to past attitudinal/conduct issues. The respondent denies the claimant was dismissed on 8 February 2023, and instead assert that the claimant resigned on 8 March 2023 in order to take up a more lucrative self-employed contract on assignment for the respondent (being placed at another client site). The respondent was not arguing that the claimant would have been dismissed in any event.
14. Mr. Williams submitted that the particulars of employment were not provided to the claimant prior to the start of his employment so was in breach of sections 1(2)(b), 11, 12 of the ERA; and section 38 of the Employment Act 2002. He agreed with the legal authorities to be applied, but said that the industry norms would point to PM's alleged words 'laid off' as being dismissed, and that the respondent had not pleaded the contractual position of 'laid off' (i.e. when employees were in between assignments). He reminded the tribunal that even if the employer treated the employment as continuing, by looking for assignments for the claimant, it did not undo the dismissal on 8 February 2023. He also stated the re-engagement in March 2023 was not determinative of a dismissal as it would not undo the earlier dismissal. He said that the lack of 'guaranteed payments' under the contract for being laid off showed that there had actually been a dismissal instead. He said the claimant gave unsophisticated evidence and that his evidence about going to sign on and contacting solicitors before the respondent offered work, pointed towards a dismissal rather than being laid off. He submitted there was a motivation to keep the claimant's name floating around in emails for work, and that PM had failed to mention the conversation he claimed he had with the claimant. Mr Williams also invited caution on AS's evidence who it was claimed asserted matters outside his knowledge. He submitted the late disclosure of relevant material was concerning and affected the weight to be given to the respondent's rebuttal of the claims.

Findings of fact

15. I have decided the case taking all the relevant evidence into account, on the balance of probabilities. I deal with key, overarching findings of fact in this section and deal with specific matters in the section below as they relate to my decision making.
16. As this is a significantly contested case, and both sides have criticised the witness evidence of the other, I have decided to set out some general observations.

General observations

17. The first is the non-compliance with the disclosure directions by the respondent. It is a serious matter, and particularly so as I indicated in the hearing that the content of the 'daily emails' may well have led to the claimant's solicitors assessing the prospects of success differently. I decided the evidence was relevant because it was probative to key factual issues. It was likely to be reliable inasmuch as it is not alleged the documents are false or otherwise not contemporaneous. Whilst it was submitted that the documents should be given limited weight, I decided that was not appropriate. I am satisfied that contemporaneous documents should be the starting point in any factual assessment and that other evidence may lead to the tribunal moving away from what the document says or purports to indicate if it is sufficiently probative. Having admitted these documents into evidence, it was open to the claimant to seek an adjournment for further disclosure. I note there appears to be some concern over the rigour to which the respondent carried out disclosure, but in the absence of seeking a further disclosure exercise we are left in limbo. I have taken account of the relatively poor excuse put forward by AS as to disclosure exercise. I accept that there were not any nefarious reasons behind the failure to disclose. The submission made by Mr Williams, in effect, to treat the respondent's evidence with caution/limited weight is too broad. I decided it was appropriate to look at these documents in the round with other evidence, including what the parties said in their evidence.
18. The second observation relates to the claim and claimant's evidence. I accept the claim was settled by his solicitors, but it would have been done on the basis of his instructions to them. I accept the claimant tried to assist the tribunal with his best evidence. There is nothing to suggest it was anything other than honest, frank evidence as the claimant understood things. Mr James put it to the claimant that his claims had been unreasonable and vexatious. I reject such characterisation. However, there are a number of markers which lead me to conclude the claimant's evidence was not reliable on key matters. His evidence was 'unsophisticated' as characterised in submissions, and it was obvious to the tribunal that his account of limited education and dyslexia likely affected his ability to read and understand complex documents. Those issues may explain the lack of understanding, recall or reliability of key matters. I note the following key thematic discrepancies.
 - 18.1 The ET1 states employment ran from 01/01/06 to 15/02/23; that is then refined to be self-employment from 2006 and becoming an employee

in 2008 (both for the respondent firm which the respondent denies as early as in an email of 31/08/23 [p288]). There are no records to support the claimant's assertions about being employed from 2008 which he maintains in his witness statement dated 20/10/23 (WS). There is an employment contract signed by the claimant from 2016, which he had seen by the time of his WS. The claimant accepted in cross-examination that his contract started on 01/03/16 and the terms were accurate. That is a significant shift in position over a few months.

- 18.2 The ET1 states the claimant did not receive written particulars or an employment contract; the contract was provided by the respondent during disclosure and the claimant refers to it in para 12WS where he accepts it is his signature, does not deny signing it, but he *'cannot remember signing the contract or being asked to sign it'*. The claimant references in his WS his surprise/disagreement with being on a zero-hours contract which does not accord with my findings below about the contract itself. This suggests a misunderstanding of the terms of his employment and a failure to recall an important aspect of signing an employment contract to that effect or at all.
- 18.3 The ET1 states that AS was the one who dismissed the claimant and that this event took place on 15/02/23. At para 31WS this changes to a phone call on 08/02/23 to PM and again at para 38WS where it states *'first time I had heard from Stevens since the telephone conversation with him on 8th February'*. In his oral evidence he said that he never dealt with AS. I am satisfied there has been a change on a key issue.
- 18.4 The ET1 states that on 07/03/23 the respondent asked the claimant to undertake some work on a self-employed basis. A natural reading of that was that a) this was after the claimed termination; and b) that the respondent was confining itself to only offering a self-employed engagement. Certainly b) is not true on the accepted evidence. Paragraphs 38/39WS refer to this situation as being PM contacting the claimant as the respondent *'had a job for me to go on in Blackpool near where I live'* and he then called PM back later *'I told him that I would not be coming back to work for them [as an employee] ...but I would do the job as a self-employed as I needed the money...'* He says at para 40WS that his election of self-employment was due to the way he had been treated and that he *'did not trust them after they claimed I was on a 'zero hours' contract'*. In his oral evidence he accepts that the respondent offered the job on an employed basis. The stated case versus the claimant's evidence is inconsistent on this key matter.
- 18.5 The claimant's para 16WS rebuts the respondent's assertion that there were times when no work was available stating *'that is not the case during the time I worked for them, there was always work'*. By his own admission in oral evidence, there were gaps when transferring to a new job. I also accepted the respondent's evidence that there were quieter times of the year when there were fewer active driver hire agreements. The claimant's claims were inconsistent with the broader evidential picture.

- 18.6 The claimant states that he did not have any chance to appeal and did not receive anything in writing about the termination [para 45WS]. However, I note that he did not make any contact with the respondent to chase this matter up either or formally object to the wrongdoing he felt he had been subjected to. I am satisfied that this lack of pursuing the respondent at the time as to why he was being 'laid off' was not satisfactorily explained by the claimant. The lack of pursuing a dismissal that he saw as unfair/being made redundant but not being complained about formally was an inconsistent set of factual circumstances. Without adequate explanation, I conclude that at the time of his claimed dismissal, he did not consider the circumstances to be as serious as him being made redundant. Nothing appears to have happened until he seemingly ran out of money and went to claim employment benefits on 03/03/23. The staff there sign posted him to seek legal advice. I do not consider the gap between 08/02/23 and 03/03/23 has been adequately explained by the claimant as to why he 'sat on his hands' and did not remonstrate with the respondent or phone them to complain. The unexplained gap of inaction suggests that he did not perceive matters to be as significant as he now casts the situation to have been. It discredits his claims sufficiently that the weight to be attributed to his recollection of a phone call with PM in the immediate aftermath of being thrown off site at Uxbridge, is reduced. The emotive component of that Uxbridge event plus the inaction for nearly a month undermines the weight to be attributed to his accounts of what PM said to him over the phone that day. There is a real risk the claimant has conflated events, ruminated whilst off work or been induced by others in terms of pursuing a claim where the immediate circumstances were not sufficiently serious for him to pursue an immediate remedy with the respondent (i.e. contacting them to find out how to appeal or what happens now etc).
- 18.7 The claimant said he started working at the Uxbridge site on 5 February but the payslips suggest he had been there several months earlier. That was not adequately explained in evidence and together with other issues of recall of key matters, undermines further the weight to be attributed to the claimant's evidence.
19. The third observation is in relation to the respondent's evidence. I accept both witnesses did their best to assist the tribunal. PM was a somewhat nervous witness with a nervous smile and a nervous manner of speaking at times, but I discounted that as simply being 'stage fright' or his idiosyncratic manner. I noted he had failed to mention the conversation with the claimant in his witness statement though he gave an outline explanation. AS was somewhat defensive at times and did seem to speculate on a few matters. I took those two aspects of potential concern into account in assessing their evidence.

Contractual findings

20. I am satisfied that the claimant started employment with the respondent on 01/03/16 and the date he has written by his signature is erroneous. There is no probative evidence to support his claims of any earlier employment with the respondent.

21. I am satisfied that the claimant was provided with a contract of employment/particulars of employment. He accepts he signed the document.
22. I am satisfied that the contract provided for a grievance procedure and an appeals procedure. The claimant ought to have been aware of this when he signed the contract.
23. I am satisfied that the contract was, in effect, a 'zero hours contract'. There is no obligation to provide work, no minimum hours offered, there are no payments due when the claimant was not working other than 'temporary stop payments' for a maximum five days in a three-month period. These payments were statutory 'guaranteed payments' for this industry as I understood it. I am satisfied that the claimant either did not properly read or understand the contract when he signed it; or that he simply forgot what the terms were that he had agreed to. There was therefore a mismatch between what he understood as being 'cards-in' (employed) and the actual zero-hours nature of the contract. This mismatch may well have passed him by as he had previously been offered regular assignments due to his willingness to work (see the paragraph below).

Workplace issues findings

24. I am satisfied that the claimant was a hard-working individual who was prepared to work at different sites, away from home for extended periods. I conclude he was willing to do this in part for the additional lodge payments he received which topped up his income. The description of the itinerant lifestyle he led sounded like a tough way to earn money. I am satisfied that other employees/ staff were less willing to undertake this form of arduous work, particularly working away. That made the claimant 'in demand' for various contracts that came up. It is more likely than not, his flexibility to fill these tough roles was why he had not really encountered down time in between assignments. It may have led him not to realise the true nature of his zero-hours contract which did not guarantee any work bar the statutory guaranteed payment.
25. I am satisfied that despite the claimant being a hard worker, he had encountered problems at client sites over the years stating '*it happens at nearly all sites people fall out*'. I understood that to mean generally clients and workers have personality issues on different jobs, and that this was not unusual. Most recently for the claimant he had been asked to leave the Uxbridge site, not to return. I am satisfied the claimant having been removed from site meant that the respondent incurred additional costs in down time and finding a replacement. I am satisfied that there had been no formal disciplinary action taken against the claimant in the past, at the point immediately before he claims he was dismissed, or otherwise.
26. I am satisfied that the respondent is an SME family run business with large value assets. There are a handful of office staff in close proximity to each other. PM undertook day-to-day management and had a vested interest in keeping the claimant on the books as he could be allocated to various 'difficult to fill' jobs. AS had a somewhat hands-off staffing role.

27. I was not persuaded by the claimant's claims that the respondent was actively replacing 'cards-in' employees with self-employed/agency staff. The accounts as to how he was aware of this indicate speculation. I preferred the accounts of the respondent's witnesses on this issue. In particular, the difficulties the industry faced in recruitment and retention of employed staff, tax benefits of workers going self-employed and that there was a benefit to the firm in having employed labour. That benefit was better control over attendance at site, customer care and compliance. I reject the claimant's evidence to the contrary, and accept there was no motivation by the respondent to force the claimant out of an employed contract.

28. All of these factors point strongly to a motivation and business-case for the respondent to keep the claimant on their books as an employee. These findings undermine the picture being painted by the claimant that he was 'managed out', 'forced out' made redundant or otherwise dismissed.

Discussion and conclusions

What was the start date of the employment?

29. I am satisfied that the claimant's employment started on 01/03/2016.

Did the respondent provide written particulars of employment?

30. I am satisfied that having signed the contract, that the claimant had received the written particulars. In any event, the contract was concluded before the effective date of the relevant ERA provisions (06/04/2020) with no retrospective application of them. As such, any claim under section 38 of the Employment Act 2002 fails as it has not been made out on balance.

Was the claimant dismissed by the respondent, or did he resign?

31. The claimant's case is that PM said he was 'laid off' which both of them agreed would mean 'sacked' or dismissed. PM denies saying this.

32. I am satisfied that the claimant was working at the Uxbridge site and was pulled up over PPE and he told the manager that this was not required in the safe zone. The manager reported this issue back to the site manager, with whom the claimant had a difficult past working relationship. The claimant was informed later on 08/02/23 that he was 'off hire' and escorted from the site. He immediately called PM *'and told him I had been kicked off the site [by the site manger]'*. I am satisfied that in the immediate aftermath of being *'kicked off the site'* the claimant may have been somewhat put out by the events. It is reasonable to infer that there may have been an emotional impact of that in the immediate aftermath, particularly with at the very least a break in earnings likely for the claimant whilst he waited for a new assignment. Furthermore, the matters set out in my findings above tend to show that the claimant's recall of matters was not particularly good on

key matters, which affected the weight to be attributed to his evidence. Taking all of those aspects into account, it casts what the claimant says happened in the conversation with PM in a different light. I am not satisfied his accounts can be relied upon. I accepted PM's evidence that he would not use the terminology 'laying off' or similar. I am satisfied on balance the term 'laid off' or 'laying off' or similar was not said by PM to the claimant.

33. I have tried to reconcile PM's evidence that the claimant did mention 'redundancy'. On balance, I have concluded this was raised for a different (unknown) reason to the one claimed by the claimant, and as PM knew nothing of redundancy was likely to have been a fleeting reference. It was never followed up by the claimant as part of any appeal, and as such was unlikely to have been a significant matter of concern in the immediate aftermath of the conversation with PM.
34. I do not accept the claimant's assertions that PM had implied the claimant should look for other work, on that phone call or previously. At best for the claimant's case, the conversations may have been as PM said in relation to him being '*a bouncing [sounding?] board*'. This may have been the nature of the conversation. I accept PM had a good working relationship with the claimant and that he did his best to keep the claimant in work. I reject the claimant's claim that PM said these words in that 'dismissal' phone call.
35. Indeed, I accepted that PM had championed the claimant in terms of him being a reliable, hardworking, employee. There was an obvious financial benefit to the respondent in keeping the claimant on the books, in particular to fill the challenging roles. I am satisfied with the evidence on the respondent's behalf that February was a quiet month and that there were only two client sites with hire/driver contracts. They were Uxbridge, where the claimant had been sacked from; and Coventry. I am satisfied there was little in the way of work generally, but moreover specifically that the claimant could be assigned to. It was obvious he could be assigned work.
36. I am not satisfied that there was a disguised attempt or active intention to get rid of (or discipline) the claimant on 08/02/23. PM had championed the claimant and as at this date I am satisfied he dealt with him in good faith, and not as a disguised attempt to force him out or dismiss him as the totality of the claimant's claim implicitly or explicitly alleges.
37. **Unambiguous words:** All of the above findings lead me to conclude that whatever the conversation between PM and the claimant, the term 'laid off' was not used by PM. He may have said there was '*no more work for him*' but that is consistent with the ordinary situation between different client assignments, particularly in February. It was also consistent with the provisions of the claimant's employment contract. As was PM's admitted evidence that he spoke to the claimant about him being on a zero-hours contract. That came as a surprise to the claimant, which may well have clouded his recall of what was actually said by PM.
38. I am satisfied that there were no 'unambiguous words' used in the telephone call that the claimant could have subjectively taken at face value that he had been dismissed.

39. **Ambiguous words:** Relying on all of the above, I now turn to consider additional surrounding circumstances to assess 'ambiguous words' that were used.
40. At 11.28 on 08/02/23 the respondent was notified by the Uxbridge client site manager, that the claimant was to *'be removed from site tonight and not to return'* due to PPE issues and his general attitude.
41. Within half an hour, PM sends out his daily email giving an update as to where the plant is hired or available to hire, and who is available to operate it. PM says *'[the claimant] has been sacked from Uxbridge! Big sigh...'*
42. In the latterly received 'daily emails PDF' there is a sequence of emails sent by PM to the sales team who place drivers/tout for new business with clients. As I understood the respondent's evidence, there was an active attempt to look for new work for the claimant, i.e. that they had not sacked him but were continuing to treat him as an operative available for work. A summary of the salient points of the emails is:
- 42.1.1 *'Willie Aitchison available for suitable employment....' on 10, 13, 14 February 2023;*
 - 42.1.2 *'Willie Aitchison still available for gainful employment....' on 16, 21, 22 February 2023;*
 - 42.1.3 *'Willie Aitchison still available – need to discuss his situation next week....' on 23, 24 February 2023;*
 - 42.1.4 *'Just like Dolly Parton in the 80's, Willie Aitchison would like to be 'Working 9 to 5!' on 28/02/23;*
 - 42.1.5 *'Willie Aitchison still available....' on 01/03/23; and*
 - 42.1.6 *'Willie Aitchison... big sigh... what we doing about him?' on 02/03/23.*
43. I do not ascribe the negative connotations to 42.1.4 as submitted on the claimant's behalf. I accept it was a 'light hearted' reference than anything inappropriate or sinister.
44. I accept PM's evidence that he was actively trying to place the claimant after 08/02/23. This runs contrary to an intention to dismiss him after the Uxbridge incident. Whilst intention is not relevant, it assists in narrowing down what might have been said. It also may assist in considering the tenor of what and how PM spoke with the claimant. If PM was minded to not allocate work, which the respondent could have done under the zero hours contract, then different words may have been spoken by him in a different manner. There are 11 emails with clear references to making the claimant available for work in the period the claimant says he had been dismissed. If the intention was not to allocate him work, then why send all these emails? It has not been asserted these are manipulated or fake emails. It would be an elaborate ruse by PM, who did not strike me as capable of coming up with such a scheme, to cover his tracks of an outburst or inappropriate conversation with the claimant whereby the claimant's services had been dispensed with. PM's post-event actions militate against having dismissed the claimant or

him having used words that could have been so construed at the time in my assessment.

45. I turn to the month's 'radio silence' between the parties, which was an unusual feature. The claimant has relied on not being contacted for a month as supporting his view he was dismissed. The claimant was someone not accustomed to being out of work. He was always busy for the respondent. The situation was different in February 2023 though in my assessment. I accepted PM's evidence that the sales manager had rung the Coventry client who said that the claimant was not welcome back due to issues around his driving. However, from PM's evidence, this information was not operative on PM's mind when he discussed matters on 08/02/23 (the phone call happened a couple of days later). This in conjunction with the Uxbridge site being ruled out meant there were no active client sites the claimant could be sent to. Given it was a quiet time of the year with no clients the claimant could be sent to, why bother ringing the claimant? The radio silence has not been shown to be for nefarious reasons or that it was as a consequence of the claimant having been dismissed. In those circumstances, I do not consider the lack of communication to have any negative connotation. Indeed, the claimant having not contacted the respondent to remonstrate was similarly an odd feature. These issues illuminate some of the surrounding circumstances, but are not definitive.
46. I do not conclude that AS's email on 03/03/23 was an insight into a guilty employer who had sacked the claimant only to give him another chance. His intervention as the managing director was also not particularly significant in my view, as it was a small company and the claimant had been causing issues at different sites despite otherwise being a hard worker. I accept the evidence that PM had in effect shielded or championed the claimant. AS's email that the claimant was '*to be offered the next operated ADT hire on the understanding that this is his final chance and needs to keep his nose clean*' was innocuous in my view. It was the owner of the company asserting his authority on the claimant as a warning that he would be disciplined in future. I accepted this explanation from the respondent's witnesses, and rejected the alternative meaning submitted by the claimant. The claimant then takes the job on, but negotiates it on a self-employed contract through the umbrella company, Hudsons.
47. Standing back looking at the surrounding circumstances, the claimant is out of work. He has been told some things he was not expecting to hear that he was on a zero hours contract, that he was not getting paid and that he may have been told there was 'no more work' for him. In the context of a claimant with an otherwise good relationship with PM, I am not satisfied that whatever was said was particularly 'negative' in tone or content as the claimant implicitly claims. The surrounding circumstances in terms of preceding events may have influenced the claimant's state of mind when he rang PM immediately after being removed from site. The surrounding circumstances both preceding and following the incident make it much less likely ambiguous words were used by PM to dismiss the claimant. I am not satisfied a reasonable employee listening to PM would have construed the words as a dismissal in all the circumstances of the case. To the extent there remains ambiguity, I construe that against the claimant. There were no ambiguous words used to dismiss the claimant.

48. I am satisfied that the claimant has not shown on balance that he was dismissed by the respondent on 08/02/23 as claimed, or at all.
49. Instead, the claimant resigned his employment with the respondent and decided to take up a self-employed role through an umbrella company, assigned to one of the respondent's clients. That contract is dated 08/03/23.

What was the effective date of termination?

50. I am satisfied that the respondent continued to treat the claimant as employed with them until they offered him the Blackpool job. The claimant then negotiates a self-employed contract to take up that role. This rejection of further ongoing employment is conduct which indicates a resignation in my assessment. As far as I understand matters, the respondent took that to be the case and the surrounding circumstances indicate that too.
51. I am satisfied that the P45 leaving date 12/03/23 is not correct. The respondent does not state the claimant gave any notice. It is more likely than not that the employment ended when the claimant signed the contract with Hudsons on 08/03/23. That is the date on which the claimant resigned.

Was any dismissal on the grounds of redundancy?

52. For all of the reasons above, the claimant resigned and was not made redundant. In any event, the circumstances of section 139 ERA were not made out on the facts of the case.

Was there a breach of contract/unfair dismissal?

53. For all of the reasons set out above, there was no breach of contract or unfair dismissal.

Is the claimant entitled to any notice or holiday pay?

54. The holiday pay aspect was settled as the respondent paid that on 24/03/23 as accepted by the claimant.
55. The claimant resigned so was not entitled to any notice pay.
56. There was some reference to unpaid 'guaranteed payments' but these had not formed part of the claim, and no permission to amend the claim had been sought. I am not satisfied that the claimant has grounds to pursue that at this stage or has satisfactorily evidenced it in any event.

Conclusion

57. The claimant has failed to show on balance he was dismissed by reason of redundancy or at all. There was no unfair dismissal. Instead, the claimant resigned his employment with an EDT of 08/03/23.

58. No sums of money are recoverable under the heads of claim.

59. The case is dismissed.

Employment Judge Shergill
Date: 09/11/2023

WRITTEN REASONS SENT TO THE PARTIES ON
14 November 2023

FOR EMPLOYMENT TRIBUNALS