



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102741/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 16 October 2023

Employment Judge Campbell

10 Mr D O'Boyle

Claimant  
In Person

15 McCallum Food Limited t/a German Donner Kebab

Respondent  
No appearance and  
No representation

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. the claimant was unfairly dismissed from his employment by the respondent;  
20 and
2. The respondent is ordered to pay the claimant:
  - a. A basic award of £776.25; and
  - b. A compensatory award of £2,639.46 in compensation.

### REASONS

25 **Background**

1. This claim arises out of the claimant's employment with the respondent which ended in January 2023. The claimant alleged that he was dismissed unfairly, and the respondent argued that the employment was ended by his resignation.
- 30 2. The claim was undefended. A copy of the claim form had been sent to the respondent's premises in Glasgow, but was sent back to the tribunal marked

'return to sender'. A copy was then sent to the respondent's head office in London. No response form (ET3) was submitted to the tribunal.

3. The full hearing of the claim took place by video and evidence was heard from the claimant. There was no appearance by or on behalf of the respondent.

5 4. The claimant lodged a number of documents with the tribunal in support of his claim, and where relevant those are referred to in the findings below.

### **Legal Issues**

The tribunal had to decide the following issues:

1. When did the claimant's employment with the respondent come to an end?

10 2. Was the claimant dismissed?

3. If so, was he dismissed for a potentially fair reason, according to section 98(1) and (2) of the Employment Rights Act 1996?

4. If so, did the respondent act reasonably in all of the circumstances by using that reason to dismiss the claimant, as required by section 98(4) of that Act?

15 5. If not, and therefore the claimant was unfairly dismissed, what compensation should be awarded to him?

### **Relevant Law**

1. By virtue of Part X of the Employment Rights Act 1996 (the 'Act'), an employee is entitled not to be unfairly dismissed from their employment. The right is  
20 subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

2. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) of the Act. Should it be able to do  
25 so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances

which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

### Findings of fact

5 The tribunal made the following findings based on the evidence provided and as relevant to the legal issues it had to decide.

1. The respondent company operates the 'German Doner Kebab' restaurant in the West End of Glasgow. The claimant began his employment with the respondent on 10 March 2019 in another restaurant in the centre of Glasgow,  
10 then moved to the West End premises. Latterly he worked as a Prep Supervisor and his main duties were to go into the kitchen area of the restaurant at the beginning of each day and ensure that everything was prepared for the day ahead. He also supervised and trained other employees in the restaurant. He worked between 20 and 25 hours per week according to  
15 a weekly rota and was paid monthly at the rate of £11.50 per hour.

2. The claimant's line manager from around August 2022 was a Mr Dale Glendinning. The claimant and he had a generally positive working relationship. The claimant had a clean disciplinary record.

3. The claimant was scheduled to work on Monday 2 January 2023 but felt  
20 unable to attend. The day before he had experienced difficulties in his relationship with his partner and his emotional state had been affected. The respondent's procedure, which the claimant accepted, was that he ought to have notified Mr Glendinning before his shift was due to start, which on that day was 8.00am. He did not notify Mr Glendinning at all of his absence on  
25 that day. He felt unwell and anxious, and forgot to do so.

4. The claimant was scheduled to work the following day, Tuesday 3 January 2023 and was able to do so. He arrived half an hour early at 7.30am because he had been absent the day before, to see if any additional help was needed. Around 9.00am a chef told the claimant that Mr Glendinning had asked him  
30 to pass on a message. That was to say that the claimant should go home,

that his remaining shifts that week were covered, and that he would be asked to come to a meeting with Mr Glendinning. The chef said he had been told to say this if the claimant came into work.

5. Later on that day, Mr Glendinning sent a letter by email to the claimant which was produced to the tribunal. It said that the claimant had not reported for work since the day before and had not been contactable despite numerous attempts to reach him. The claimant was asked to contact Mr Glendinning by telephone. It suggested that Mr Glendinning understood that the claimant's absence had continued to the day of the letter itself, which was incorrect as the claimant had by then reported back at work.
6. The claimant then began a text message conversation with Mr Glendinning which was provided to the tribunal. He said at 12.57 on that day that he had just received Mr Glendinning's emailed letter and explained that he had been told to leave work, that his shifts were covered, and that he would be invited to a meeting to discuss the situation. Mr Glendinning replied to say, '*Call me to discuss*'. The claimant said that he would rather communicate by text, and asked if he could just be given details of when the meeting would be. Mr Glendinning messaged back to say he was only following company policy.
7. The claimant therefore had no more shifts to work that week. He reported back at work on Monday 9 January 2023 and worked between 8.00am and 10.30am, when Mr Glendinning asked him if he could attend a meeting in the upstairs office. The claimant agreed. Also present was another employee named Courtney.
8. Mr Glendinning asked the claimant about what had happened on the previous Monday when he had not attended work. The claimant explained the circumstances which had caused him to feel unable to work that day. He also explained that he had attended work early the following day and was ready to carry out his duties as normal again. Mr Glendinning thanked him for being open, but said that he was going to terminate the claimant's employment. The claimant was angry and upset, but accepted the decision had been made. He said that he wanted to be paid for what he had earned to date. At this point

he had not been paid for any days worked in December 2022 or January 2023. He left the premises. The meeting lasted around 20 minutes.

9. The claimant next contacted Mr Glendinning at 14.54 that afternoon. He asked '*what is happening please*' and said he wanted to be paid. Mr Glendinning replied to say '*I've got cash here for you*'. The claimant agreed that he would come into the restaurant to collect it. He accepted the number of hours that Mr Glendinning had calculated to be due. He said he would be there around 16.20.
10. The claimant expected to receive written notification of his dismissal but was sent nothing by the respondent. On or around 21 February 2023 he called in to ask for confirmation in writing to help with a benefit claim. He was asked to leave. Mr Glendinning later said that he had resigned but had not confirmed his resignation in writing. On 21 February 2023 Mr Glendinning emailed him an undated letter which was headed '*Your verbal resignation*'. It said that following discussion on 3 January 2023 the claimant had advised Mr Glendinning of his resignation. It went on to say that the claimant had been asked to confirm his resignation in writing which he had not done, and that his resignation was now being processed. Any outstanding pay would be issued by 3 March as well as a P45.
11. The claimant did not find alternative work until the middle of April 2023. He worked in the kitchen of a pub and restaurant. He did not have fixed or regular hours and provided cover when needed. This amounted to around four hour per week at a rate of around £11 per hour. He had to give up the work after around four weeks through illness. He is undergoing medical tests, including scans and x-rays, for a possible tumour. He has been prescribed anti-anxiety medication by his GP. From March 2023 he has received Universal Credit at the standard rate for adults over 25 of £368.74 per month (therefore equivalent to £85.09 per week) and since around August 2023 he has received an additional payment which takes the total up to £700 per month (£161.54 per week).

### Discussion and decision

12. On the evidence it is accepted that the claimant was dismissed on 9 January 2023. It was noted that the respondent disputed this at a later date, but the claimant's oral evidence on oath was preferred.
13. The onus falls on an employer to show that its reason for dismissal of an employee was a fair one in terms of section 98(1) and (2) of the Act. This means that the dismissal must have been by reason of capability, conduct, some form of irregularity or illegality in the contract, redundancy or 'some other substantial reason'.
14. It is not easy to discern the reason for the claimant's dismissal, especially as the respondent denied having dismissed him at all, and was not present at the hearing to make submissions. In particular, it was not clear whether the claimant was dismissed because of capability, in the sense of being genuinely ill and therefore unable to work, or alternatively conduct, whether that was because he was considered not to have had a good reason to be absent from work, or because he did not follow the absence notification procedure (or a combination of the two). The reason for dismissal may have been none of those.
15. Therefore the tribunal found that the respondent had not discharged the onus of proof upon it to show that it dismissed the claimant for a potentially fair reason.
16. This finding alone is enough to render the claimant's dismissal unfair. The tribunal considered the process followed, with reference to the test of reasonableness set out in section 98(4) of the Act. It did so primarily with a view to assessing what award of compensation would be appropriate.
17. As the reason for dismissal was not clear, it was similarly unclear as to what would have been a reasonable procedure to follow. That is to say, there are bodies of case law which have provided guidance to employers and tribunals in relation to what steps would normally be taken in a process involving dismissal for misconduct, capability or redundancy for example. The process for each would not be identical, although there may be some common elements and themes.

18. The tribunal considered that a fair process, whatever the ultimate reason for dismissal, would have involved:

a. The claimant being given fair notice of the meeting at which his dismissal was being considered;

5 b. Also being given notification that a decision could be taken to end his employment based on what was covered in the meeting;

c. Being given written notification of the dismissal decision and the reasons for it; and

d. Being given the right of appeal against the decision.

10 19. None of those were features of the process the respondent followed.

### Compensation

20. On the basis that the claimant's dismissal was found to be unfair, the tribunal considered what would be a suitable award of compensation.

15 21. Compensation for unfair dismissal normally comes in two parts, a basic award and a compensatory award.

22. A basic award is calculated in the same way as a statutory redundancy payment. The claimant's date of birth is 12 September 1979. His continuous employment began on 10 March 2019. His average weekly hours fell between 20 and 25, and therefore an average of 22.5 is used. His gross rate of pay was £11.50 per hour, equating to £258.75 per week on average. A basic award is calculated to be £258.75 x 2 years x 1.5 (to account for his age at dismissal) which equals **£776.25**.

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23. A compensatory award should be a fair reflection of a claimant's genuine financial loss caused by the dismissal. It can be varied, usually downwards, to reflect things such as that a claimant was partly culpable in their own dismissal, or if they did not make reasonable efforts to mitigate their losses by finding other sources of income, or because their dismissal would likely have happened for a fair reason in any event.

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24. The claimant's initial financial loss was the net equivalent of £258.75 gross per week. He did not provide any payslips to show itemised deductions for income tax, employee National Insurance contributions or any other lawful deductions. His earnings were just above the threshold for income tax, taking into account the annual personal allowance, and the threshold for National Insurance contributions. His net pay is estimated at £225.00 per week.
25. He was able to partly mitigate his loss in March of this year by claiming benefits, which increased in August, and by finding work for a short period in April and May.
26. The claimant is awarded compensation as follows:
- a. £225.00 per week from 9 January until 5 March 2023 (8 weeks) – making £1,800.00; and
  - b. £139.91 per week from 6 March until 16 April 2023 (6 weeks) – amounting to £839.46. This takes into account that Universal Credit was now being paid.
27. The tribunal considered that the claimant ought to have found other work which would have paid enough to match his earnings with the respondent by 17 April 2023. This is reinforced by the fact that he started a new role around that date, albeit working fewer hours. This indicated that he was willing and able to work. Given the generally constant availability of kitchen work in the Greater Glasgow area, the tribunal's view is that he would have been able to secure sufficient work by making reasonable efforts. The only apparent limits on the claimant working at that point were the level of effort he made and his health. Neither of those were attributable to the respondent's actions.



28. On the above basis, the compensatory award is calculated as **£2,639.46**.

5      **Employment Judge:      B Campbell**  
**Date of Judgment:      16 November 2023**  
**Entered in register:      21 November 2023**  
**and copied to parties**