



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104291/2023

**Final Hearing held
In Edinburgh on 18 December 2023**

Employment Judge A Jones

Mr D Lambert

**Claimant
Represented by:
Mr T Lambert (father)**

Land & Utilities Ltd

**Respondent
Represented by:
Mr D McGuire, solicitor**

JUDGMENT

The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant a basic award of £1142 and a compensatory award of £18,037.65. The respondent is also ordered to pay to the claimant compensation of 2 weeks' pay being £1142 in respect of its failure to provide the claimant with a copy of terms and conditions of employment in accordance with section 1 Employment Rights Act 1996.

REASONS

INTRODUCTION

1. The claimant lodged a claim on 12 August 2023 claiming that he had been unfairly dismissed by the respondent and that the reason for his dismissal was related to health and safety issues which had been raised by him. In the alternative he argued that his dismissal was unfair.

2. The respondent's position was that the claimant had resigned from his employment and was not dismissed.
3. The claimant was represented by his father and the respondent represented by Mr McGuire who is a solicitor. The claimant gave evidence on his own account and evidence was led from Messrs Kelly and Agnew of the respondent who are Contracts Manager and Manger respectively. A small bundle of documents was lodged. Both parties made oral submissions.

Findings in fact

4. Having considered the evidence heard, the documents to which reference was made and the submissions of the parties, the Tribunal made the following findings in fact.
5. The claimant commenced employment with the respondent on or around 8 March 2021. The claimant was not issued with a statement of terms and conditions at any time.
6. The claimant was employed as an arborist, which is similar to a tree surgeon. He carried out tree surgeon work and also general landscaping works when there was no requirement to carry out tree work. He reported to Mr Agnew and sometimes to Mr Stark.
7. Mr Agnew is a manager responsible for the carrying out of contracts for the respondent. The respondent carries out tree and landscaping works for private and commercial customers and has around 10 staff. While Mr Agnew is also a trained arborist, he has not been involved in carrying out that work on a regular basis since he took over a managerial role around 4 years prior the termination of the claimant's employment.
8. The respondent does not keep risk assessment documents associated with all contracts. No risk assessment documents were completed in relation to the job which was to be carried out on 14 March 2023 by the claimant.
9. The claimant had previously raised concerns about health and safety issues around November 2021, when he was criticised by Mr Agnew for taking

longer to carry out a job than had been anticipated when the job had been priced. The claimant raised his concerns with the respondent and left the workplace on the day these issues were raised. He subsequently returned to work in the days after. The claimant was from around November 2021 the
5 only trained arborist employed by the respondent who regularly carried out that work.

10. The respondent issued first aid and health and safety certificates to staff who had not completed the relevant training, in order to comply with requirements of a client for whom they were working. This took place
10 around March 2023. The respondent has a cavalier attitude towards health and safety matters.

11. The claimant suffers from anxiety and depression and takes medication for these conditions. The respondent is aware both of the claimant's conditions and the medication he takes. The claimant did not carry out work with a chainsaw, for which he is qualified if he felt adversely affected by the
15 medication.

12. On 14 March 2023 the claimant was given details of an address he should attend to carry out a job. The job had been priced by Mr Curran who owns the respondent company and was for a client who also provided support to
20 the Five Sisters Zoo, which is also owned by Mr Curran. In common with other jobs to which the claimant was sent to carry out, no risk assessment was carried out in advance of the job being undertaken. The claimant was simply given an address for the job and no details of what the job entailed. The job involved removing a 70 foot tree from a garden. The tree was on a
25 slope, was accessed by old steps which were slippery due to the weather and was in a site which could not readily be accessed by emergency services if there were any issues. There were three other employees of the respondent present at the job with the claimant and Mr Curran was also present on site.

13. The claimant indicated to Mr Curran that he was not willing to carry out the
30 job without a rescue climber, who could assist if he got into difficulties. It

was suggested that Mr Agnew could act as a rescue climber. The claimant was not comfortable with that suggestion on the basis that he did not understand Mr Agnew to carry out this work anymore and had concerns over his fitness levels. Mr Agnew had never previously acted as a rescue climber for the claimant.

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14. The claimant was then sent with colleagues to another job.

15. In the evening of 14 March 2023, the claimant contacted Mr Curran and asked if he could transfer to work at the Five Sisters Zoo. The claimant was concerned that the issues he had raised regarding health and safety matters had not been addressed by the respondent. Mr Curran indicated that a transfer was not likely as the zoo had little funds.

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16. On the morning of 15 March, Mr Kelly asked to speak to the claimant in the office on his arrival at work. Mr Kelly was annoyed with the claimant having spoken to Mr Curran directly when in Mr Kelly's view, he should have raised any issues with him. The discussion became heated and both Mr Kelly and the claimant were angry and raised their voices. Mr Kelly told the claimant that he should go home 'on the sick'. At some point during the conversation, Mr Agnew came into the office and there was a discussion regarding the job the previous day, when Mr Agnew reiterated that he could have acted as a rescue climber.

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17. The claimant left the respondent's premises and went home, having taken his tools out of the respondent's vehicle and dropped off a colleague on his way home.

18. Around 17 March, the claimant attended the respondent's premises and gave Mr Agnew the keys for the container in which tools were kept.

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19. The claimant contacted Mr Agnew subsequently by phone to find out when he was to come back to work. The claimant was initially told that a decision would be taken when Mr Curran returned from leave, but there was no further contact with the claimant regarding his return to work.

20. The claimant contacted Mr Agnew at some point in early April and asked for his P45 as he formed the view he had been dismissed. A P45 was prepared around 10 April indicating that the claimant's employment had terminated on 30 March.

5 21. The respondent did not send any correspondence regarding the termination of the claimant's employment to him. Instead, the P45 was sent with the claimant's last wage slip. The claimant was paid up to 23 March, and was also paid for accrued holiday entitlement.

10 22. The claimant worked for Field and Lawn from 9 June until 9 August and worked 30 hours a week at a rate of £11.50 per hour. He then worked for Landscape Design Contracts Ltd at £12.50 per hour from 14 August until around 1 December. He is presently out of work.

23. The claimant earned £15 per hour gross when working for the respondent and worked around 39 hours a week.

15 **Issues to determine**

24. The Tribunal was required to determine the following issues:

- a. Was the claimant dismissed or did he resign?
- b. If the claimant resigned, did he resign in circumstances in which he was entitled to treat himself as having been dismissed.
- 20 c. If the claimant was dismissed what was the reason for that dismissal?
- d. If the claimant was unfairly dismissed, what compensation should be awarded.

Observations on the evidence

25 25. The Tribunal was surprised that given that the claimant alleged he had been dismissed for reasons related to health and safety, that the respondent did not produce nor lead evidence on any policies or procedures it operated in

relation to health and safety. The only evidence regarding procedures appeared to be that it was for the claimant when he attended a job (which had already been priced) to carry out his own risk assessment, which would not be documented. Given the claimant was required to take down a 70ft tree and was the only qualified arborist sent to the job, the Tribunal found this, together with the falsification of first aid certificates and lack of any procedures related to health and safety demonstrated that the respondent had a cavalier attitude towards matters of health and safety. The Tribunal noted, with surprise that the claimant's evidence regarding the first aid training was not challenged.

26. The Tribunal also accepted the claimant's evidence that he had raised matters of health and safety with the respondent and that this fell on deaf ears. This, together with the failure of the respondent to issue terms and conditions of employment to the claimant and Mr Stark suggested to the Tribunal that the respondent had little regard to its obligations towards the claimant. While the Tribunal took into account that the respondent was small employer, nonetheless it seemed obvious that some of the work the claimant was required to carry out was dangerous work and there were no procedures in place to protect him in that regard.

27. The evidence of the claimant and the respondent's witnesses was different in relation to the events of 15 March. That said, Mr Agnew candidly admitted that he was not present for the whole of the meeting between the claimant and Mr Stark and therefore could not say what had been said before he joined them. There was also a dispute over when the claimant had given the respondent his keys. Mr Agnew said that the claimant had 'flung them' across the table on 15 March, while Mr Stark said that the claimant had subsequently given these back. The Tribunal preferred the claimant's evidence that he had given these back in the days following 15 March. The Tribunal accepted that the claimant had been confused regarding dates, however the Tribunal did not accept the respondent's submission that his confusion indicated that he was neither credible nor reliable. The respondent's witnesses also appeared confused regarding dates during the course of their evidence.

28. The Tribunal found the claimant to be a credible witness. He gave his evidence in a straightforward manner. While it was accepted that his evidence regarding dates might not be reliable, this did not impact on the material issues for the Tribunal to determine.

5 29. The Tribunal did not find Mr Stark to be wholly credible or reliable. It preferred the claimant's evidence as to what happened in the meeting between him and the claimant. Mr Stark accepted that he was annoyed that the claimant had spoken to Mr Curran directly, which he felt undermined his own position. However, the Tribunal concluded that he underplayed that
10 annoyance and that he did tell the claimant to go 'on the sick' as he was aware of the claimant's health issues and wanted him away from the workplace.

30. Neither did the Tribunal find Mr Agnew to be wholly reliable or credible. The Tribunal was of the view that his evidence that the claimant had 'flung the
15 keys' on the desk was embellished. The Tribunal noted that this had not been put to the claimant in cross examination. Mr Agnew also seemed somewhat unsure about his evidence regarding whether he had any discussions with the claimant after 15 March. The Tribunal accepted the claimant's evidence that there had been some discussions and that Mr
20 Agnew had said that it was not for him to say whether the claimant could return to work.

31. The Tribunal was also somewhat surprised that it did not hear from Mr Curran regarding his interactions with the claimant.

Relevant law

25 32. Section 95(1)(a) Employment Rights Act 1996 ('ERA') provides that an employee will be treated as dismissed if his or her contract of employment is terminated with or without notice.

33. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that

he or she is entitled to terminate it without notice by reason of the employer's conduct.

34. Section 100(1)(c) ERA provides that an employee will be regarded as having been unfairly dismissed if he brought to the employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

Discussion and decision

Was the claimant dismissed?

10 35. In the first instance, the Tribunal considered whether the claimant had been dismissed by the respondent. The Tribunal concluded that the claimant had been dismissed. In particular, the Tribunal accepted the claimant's evidence that he was in contact with Mr Agnew in order to find out if and when he would be allowed to return to work. The Tribunal accepted that Mr Stark had told the claimant to leave the workplace and 'go on the sick'. The respondent did not issue any correspondence to the claimant in relation to the termination of his employment. The Tribunal concluded that if the respondent had genuinely been of the view that the claimant had resigned on 15 March, it would have at the very least issued the claimant's P45. His P45 was not issued until May according to the claimant's evidence which was accepted by the Tribunal. The P45 itself indicated that the claimant's employment terminated on 30 March and there was no explanation as to why this should be the case if the respondent was of the view that the claimant had resigned on 15 March.

25 36. Rather, the Tribunal concluded that there was some ongoing discussion between Mr Stark, Mr Agnew and Mr Curran as to whether the claimant should be allowed to return to work and when the claimant contacted the respondent again in April, the claimant's P45 was prepared and he was issued with his final wage slip.

37. Therefore while the respondent did not dismiss the claimant in express terms, the Tribunal found that sending him home, failing to tell him that he could come back to work and then issuing his P45 amounted to a dismissal.

What was the reason for the claimant's dismissal?

5 38. The Tribunal concluded in the absence of any other explanation, that the reason for the claimant's dismissal was that he had raised concerns regarding health and safety and that this was not the first time he had raised such concerns. The Tribunal was of the view that Mr Stark was particularly aggrieved that the claimant had discussed his employment with Mr Curran and that in doing so, Mr Stark's position had been undermined. In these
10 circumstances, the Tribunal concluded that the reason for the claimant's dismissal was a prohibited reason in terms of section 100(1)(c) ERA and was therefore automatically unfair.

15 39. Even if the Tribunal is wrong in its conclusion that the claimant was dismissed for having raised issues of health and safety with the respondent, there was no potentially fair reason for dismissal advanced by the respondent. The respondent's position was simply that the claimant had resigned.

20 40. There was no dispute that no procedure had been followed in relation to the termination of the claimant's employment. In these circumstances the Tribunal was satisfied that even if the claimant's dismissal was not automatically unfair, it was unfair as there was no potentially fair reason for dismissal established by the respondent and in any event no fair procedure had been followed.

25 41. For all these reasons, the Tribunal found that the claimant had been unfairly dismissed.

42. In addition, there was no dispute that the claimant had not been provided with a copy of terms and conditions of employment in accordance with section 1 ERA.

What compensation should be awarded to the claimant?

43. Having established that the claimant had been unfairly dismissed, the Tribunal went on to consider what compensation should be awarded to him. The claimant is entitled to a basic award of £1142 on the basis that he is entitled to two weeks' pay at the statutory cap of £571, his date of termination of employment of employment being 30 March.
44. The claimant is also entitled to compensation for loss of statutory rights of £500.
45. The claimant received no pay from 15 March. His payslip for 23 March indicated that he had been paid the equivalent of 2 days' pay that week.
46. Taking into account the payslip of 16 March (as the following payslip was not for an average week), the claimant's average net weekly pay was £487.76.
47. The claimant obtained alternative work at a lower hour rate of pay. He has been looking for work for the last 2 weeks. The Tribunal accepted the claimant's evidence that the time of year made it difficult to obtain work of the nature carried out by him.
48. The claimant has, according to the payslips provided, had net income of £5512.36 since his dismissal. The Tribunal would however note that the payslips were difficult to read and if there is an error in the computation, parties should seek a reconsideration in that regard. The Tribunal understood that the claimant continued to work until around 2 weeks before the hearing, on the basis of an average weekly wage of £439.56, his income during that period would have been £4395.60.
49. From 15 March to 27 December being 41 weeks, the claimant would have expected to have a net income of £19,998.16.
50. Therefore, the claimant has net loss of earnings to 27 December of £10,090.20 (being £19,998 minus (£5512.36 + £4395.60)). the Tribunal accepts that given the time of year, and nature of the claimant's work, the

claimant is likely to remain unemployed for a period of 3 months. His losses over that period would be $12 * 487.76 = £5853.12$.

51. He therefore has total financial losses of £15,943.32.

52. The Tribunal considers that as the respondent did not follow any procedure in relation to the claimant's dismissal, an uplift of 10% would be appropriate, which is £1,594.32.

53. In terms of section 38 Employment Act 2002, where an employer has failed to meet the requirements of section 1 ERA and a Tribunal finds that a claimant has been successful in one of the claims set out at Schedule 5 of that Act (which includes unfair dismissal), a Tribunal is bound to make an award in respect of two weeks' pay which is calculated in accordance with ss. 220-229 ERA. On that basis the Tribunal makes an award to the claimant of £1142.

54. The total compensation payable to the claimant by the respondent is therefore as follows:

	Basic award	£1142.00
	Compensatory award	£15943.32
	10% uplift	£1594.33
	Loss of statutory rights	£500.00
20	Failure to provide s.1 statement	<u>£1142.00</u>
	Total payable	£20321.65

A Jones

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Employment Judge
27 December 2023

Date sent to parties

Dated 03/01/2024