



EMPLOYMENT TRIBUNALS

Claimant: Mr S Kimberley
Respondent: HTC Solutions Limited
Heard at: Birmingham
On: 18 & 19 March 2024
Before: Employment Judge Flood

Representation

Claimant: Mr Ratledge (Counsel)
Respondent: Mr Randall (Attorney – US qualified)

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

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 15 October 2023, the claimant brought complaints of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 (“ERA”); breach of contract (notice pay) and unpaid holiday pay.
2. There was some discussion at the outset of the hearing on the issues in dispute between the parties. Mr Randall confirmed that the key issue to determine was whether the claimant was dismissed or whether he resigned and that if the Tribunal find that the claimant was dismissed, this was necessarily an unfair dismissal and a dismissal in breach of contract. No potential fair reason was advanced by the respondent. Following a discussion, the claimant confirmed he was no longer pursuing a complaint in relation to unpaid holiday pay so that complaint was dismissed upon withdrawal.
3. In relation to remedy, the claimant confirmed that he was not seeking reinstatement or re-engagement and the respondent confirmed that it would be submitting that any compensatory award should be reduced on the basis

that it contends the claimant could have been dismissed fairly for some other reason, thereby reducing the period of financial loss and/or. The claimant sought an uplift for failure to comply with the ACAS Code which the respondent disputed.

4. The issues that were in dispute between the parties are set out below.
5. At the end of the second day of the hearing the Tribunal gave oral judgment. The claimant was successful in his complaint of unfair dismissal. The respondent was ordered to pay the claimant a basic award in the sum of £19,290 and a compensatory award in the sum of £42,205.55 (calculated in accordance with the attached Schedule). The claimant's complaint of breach of contract was also successful but no award of damages was made as the losses incurred by the claimant were included as part of the compensatory award for unfair dismissal. The claimant's complaint in respect of unpaid holiday pay was dismissed upon withdrawal.
6. The respondent made a request for written reasons in writing on 20 March 2024. The Tribunal's reasons are set out in this document.

Documents before the Tribunal

7. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle.

The Issues

8. The issues which needed to be determined were:

1. **Unfair dismissal**

- 1.1 Was the claimant dismissed? The respondent contended that the claimant resigned on 19 July 2023/ The claimant contended that he was dismissed on either 19 July 2023 (when his access to its systems was revoked etc) or on 21 July 2023, when the respondent set out its position on his continued employment.
- 1.2 If the claimant was dismissed, it was necessarily an unfair dismissal as the respondent does not advance a fair reason for any such dismissal.

2. **Remedy for unfair dismissal**

- 2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.1.1 What financial losses has the dismissal caused the claimant?

- 2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 2.1.3 If not, for what period of loss should the claimant be compensated?
 - 2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway for some other reason?
 - 2.1.5 If so, should the claimant's compensation be reduced? By how much?
 - 2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 2.1.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
 - 2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 2.1.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
 - 2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 2.1.11 Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?
- 2.2 What basic award is payable to the claimant, if any?
 - 2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. **Wrongful dismissal / Notice pay**

- 3.1 If the claimant was dismissed, he was also necessarily dismissed in breach of contract as the respondent acknowledges that no period of notice was given.

Findings of Fact

- 9. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner through the judgment.

Witnesses and other individuals

- 10. The following people attended to give evidence on behalf of the claimant:

- 10.1. The claimant ('C')

- 11. The following people attended to give evidence on behalf of the respondent ('R'):

- 11.1. Mr C Lamont ('CL'), director and co-owner of R

- 11.2. Mr D Bourne ('DB'), Customer Support team leader at R
- 11.3. Mr P Fegan ('PF')
- 11.4. Mr N Hollinshead ('NH')

12. The following individuals were referred to during the evidence:

- 12.1. Ms C Chidlow ('CC'), director and co-owner of R

Credibility

13. The oral evidence given by C was consistent with his witness statement, the claim form and the very few contemporaneous documents. The Tribunal accepted much of what C said and found that his recollection of events was good. Whilst I did not find CL to be dishonest, I found the evidence of CL to be less reliable as there was some inconsistency between the contemporaneous account he set out in his e mail after the incident and his later witness statement. Some of his answers to cross examination shed doubt on his account although I accept he was nervous when giving evidence before the Tribunal. I found DB, NF and PH on the whole to be honest witnesses, although the recollection of NF and PH was not entirely sound as to precisely what was said, perhaps understandably given the passage of time and their limited involvement. The fact that DB gave almost word for word precisely the same account of the incident as CL also may suggest that his recollection was influenced understandably by later events and discussions with others. I make no criticism of any of the witnesses in relation to this and find no intention to intentionally mislead. However, where there was a dispute in evidence, I tended to prefer the evidence of C as this was clear and did not alter during cross examination. C was able to make concessions where he could around the Bulk Logistics project being challenging, and that CL and others were under significant pressure to get it completed which again made his account on key matters of recall more convincing.

14. On the relevant evidence raised, the Tribunal made the following findings of fact:

- 14.1. R is involved in developing and providing technology solutions and software for haulage, transport and warehousing. It operates from a premises at Lymedale Business Park in Newcastle under Lyme and at the time of the events leading to this claim had around 19 employees. The business operated from two floors on site, with the top floor being an open plan office where C, DB, NF were based and sat close together. CL and CC were also based on this floor at sat at the opposite corner. There were further offices on the floor below including meeting rooms.
- 14.2. C had worked with R from 29 June 1988 and was employed in the role of technical director. He had two direct reports, Mr D Banton and Mr M Clarke who were programmers. C had never been subject to any disciplinary action or any performance management during his employment. He was responsible for the design and development of the

software that was still produced by R and had won a number of awards for innovation.

- 14.3. C's current contract of employment signed on 12 October 2011 was at page 29 to 39. I was referred to the following clauses in the contract:

Notice Period and Company Property

Following successful Completion of the probation period, employment may be terminated by either the Company or yourself by giving three months notice in writing.

- 14.4. On 27 October 2010, C agreed a variation to his contract of employment, agreeing that his working days would be reduced to 3 days per week with effect from 1 November 2020 (page 40). Following discussions C also agreed to resign as a director of the company which took effect on 22 February 2022 (page 41). C gave unchallenged evidence that in the last 2-3 years his position, authority and responsibilities had been eroded to the point that he felt worthless. He mentions some projects being allocated to PF, and PF being promoted to the same level as he was. He felt sidelined but continued to work and carry on with his role to the same level with full commitment and enthusiasm. C again gave unchallenged evidence that he had been told by CL that he could stay in his role as long as he wanted, and he could do this past his retirement age of 66 which he was to reach in July 2024.

Events leading up to 19 July 2023

- 14.5. C had been working on a project in the months prior to his departure which was referred to as the Bulk Logistics project which started in September 2022. C was responsible for the TMS1 solution within that project. The Tribunal heard about the ticketing system which was used by R to track progress on this and other projects. Whilst C was not the ticket owner for this project, he did update tickets on the system from time to time as tasks were carried out. He first updated the system on 12 October 2022. The original go live date for this project was 21 January 2023, but this was subsequently delayed on two occasions to March and subsequently to the end of July 2023. R to some extent held C responsible for many of the delays in this project. C believed that there was nothing out of the ordinary in terms of delay and some of these were out of the control of him and R, being caused in part by the client having connectivity issues (which was quite normal for large software projects of this nature). C admitted that there were some issues that had not been foreseen at the start of the project. He also agreed that it was quite difficult for him to keep on top of the project, as he was working 3 days a week and so matters would progress in his absence and he would not always be up to speed with what had taken place. Whilst it was not necessary to make detailed findings of fact about this particular project it is clear that there were some tensions within R around the completion of the project and that CL and others at R felt that C was not progressing matters quickly enough.

- 14.6. On 12 July 2023, CC e mailed the claimant copying CL informing the recipients that she would be onsite with the customer on 24 July 2023 to make those involved aware of the importance of getting outstanding tasks done, deployed and tested by then. There was a conversation between C and CL on 12 July 2023 where C was informed that CC was concerned about lack of progress as she was about to go on annual leave.

19 July 2023 Incidents

- 14.7. At 5.57am on 19 July 2023, CC sent an e mail to C copying CL in relation to the Bulk Logistic project (page 42-43). This stated as follows:

“Morning Steve

As we are getting to the critical timing with Bulk Logistics it is vital that the elements below are confirmed / tested and updated by COP this Friday ready for them for Monday.

We are aware as they are all documented on the ticket however for ease, I've listed them below. I am onsite with them today so can you keep me updated.

- 1. the ability to transfer jobs from one company to another and how this process works*
- 2. The ability to scan documents*
- 3. The ability to send outbound emails and test the outbound emails*
- 4. The ability to confirm the price at point of saving or via an auto routine.*
- 5. Reimport of all sun is emails (files are on the ticket)*
- 6. Any outstanding tasks from the ticket”*

- 14.8. CL responded to the mail at 6:08 am (page 42) stating:

“Can you confirm point 5 please Clare.

For clarity, as this is a critical project at a critical stage of deployment, all of the outstanding points need completing, testing and be signed off by us and the customer before anyone involved in the project from our side leaves the office tomorrow evening.

@Steve Kimberley - please ensure you and your team are aware and prepared for this.”

C told the Tribunal that he felt that this e mail “*set the tone for the day given the timing and the content of the e mails*”. C said he had never received an e mail of that nature from anyone at R before and felt it was “*almost bullying*” in that the message was that he could not go home until all tasks were completed and that he had to make sure all staff did the same. The email did not ask for a response from C to the points raised but C agreed in cross examination that he would have been expected to update CC in response to the issues raised during the course of the day. He also accepted that R had a right to be concerned about delays in the project and what was taking place on it.

- 14.9. C arrived for work on 19 July 2023 carrying a scanner he had bought himself the previous day to try and resolve some issues that had arisen on site at the client regarding scanning. When C arrived CL was in a conversation with DB at DB's desk which was situated diagonally opposite to his. PF who sat next to C was on the telephone on C's arrival.

C's account of the incidents

- 14.10. C gave evidence that within 5 minutes of his arrival at work CL began to question him in front of all his colleagues about the outstanding tasks that were needed for the customer go live that week. C said that CL was *"extremely aggressive and abrupt with his manner in front of the entire work force"* and that C felt humiliated and embarrassed. When asked further about this, C said that CL made a comment in the claimant's direction stating something like *"Who is responsible for ensuring that the tasks are done and the solution is delivered on time"*. He said that CL did not raise his voice, but it was a stern and intimidating remark. C said he responded along the lines of *"Well that is obviously me isn't it"* admitting that he was reasonably forceful in his response but that he was not aggressive or loud and was responding in a similar manner to the way CL spoke to him. C said he then tried to explain to CL that the tasks were unlikely to be completed on time, but that CL was unwilling to listen; interrupted him and said in an aggressive manner *"Don't start getting shitty with me"*.
- 14.11. C said the conversation started deteriorating rapidly at this point. C said that CL then told him that this contract had been in place for 9 months and that all tasks would need to be done before anyone in the team, including C, went home on the evening of 20 July 2023. C agreed when asked that he told CL he had seen CL's e mail and again contended he said this in an assertive tone but that he was not aggressive. He contended that at this stage both he and CL were speaking over each other. C told us that he said to CL:

"Craig, I'll make it easy for you and get back in my car."

C said that CL replied by saying:

"If you do that then don't bother coming back, I'll give you 15 minutes to think about it"

- 14.12. C did not make a contemporaneous note of exactly what words were used but was confident that his recollection was correct. C contended that at this point, CL walked away and returned to his desk. C told the Tribunal that following this he was in shock and very scared and that *"had no option but to leave the building"*. He told us he thought that CL had said this *"in the heat of the moment as part of the disagreement, in an attempt to bully and pressurise me to meet the deadline"* and he did not think that CL was *"actually threatening me with the end of my employment at HTC"*. C said that when he left this was not an attempt to resign but an attempt

to follow his instinct and to *“try to de-escalate the situation and resolve it at a later time, not in front of the entire workforce and in a professional manner once [CL] had calmed down”*. Within 10-15 minutes, C said he got up and took his bag and walked out of the office. When it was put to him that when he got up and left, he knew that he was resigning his employment, given what CL had just said, C disagreed. C said that he assumed that a subsequent meeting would take place; that differences would be resolved, and the situation would go back to normal as the statement by CL had been made in the heat of the moment. When asked why he did not go elsewhere within the office to reflect and diffuse the situation, C said that he could have taken that option, but he chose to go home as he could work from home with complete connectivity. C did not take any of his personal effects when leaving.

- 14.13. When asked about this, C said that although he could not remember doing this, he accepts that upon leaving the building he tapped PF on the shoulder and said words to the effect of *“see ya”* or something similar because this was normal behavior for him when he left the office.

CL’s account of events

- 14.14. CL gave an account of events in his witness statement that as C arrived for work at 9:30 am, he was in a conversation with DB about the Bulk Logistics project and DB mentioned to him that D Banton was currently working through the job transfer and e mail functions referred to at point 2 of CC’s e mail sent that morning. CL then said he said out loud in the direction of C and PF who were sitting opposite *“who is managing this project to ensure tasks are done and the solution is delivered on time?”*. CL contended that C responded *“well, that’s obviously me isn’t it”*. CL then said he started to speak to *“emphasise the importance and urgency of the project”* and that C spoke over him in a *“direct, firm and somewhat aggressive voice”* and said, *“well yes, I’ve seen your email this morning”*. CL stated that before he could respond to this that C stated,

“there’s an easy way to resolve this you know” to which CL asked, *“what’s that?”* and C said, *“I can pick up my bag and go”*. CL put in his witness statement that he then said:

“if that is what you want to do then that is your choice, however, if you choose to do that, don’t bother coming back”.

- 14.15. CL gave evidence that he then added that it was then just past 9:30am and the Claimant should take until 9:45am to consider his decision. CL then said that DB approached him to ask if they could continue the discussion, *“in a more civilised way”* at which time CL went back to his desk and DB came with him.

- 14.16. CL then said he saw C pick up his bag and leave the office and as he left the office, he patted PF’s shoulder and said, *“bye Pat, see you around”*. When asked in cross examination whether he in fact saw this and why this was not mentioned in the contemporaneous note (see below) CL said he was not sure why this was not mentioned at the time

and that whilst he did not hear what was said (as he was at the other side of the room), he did see C put his hand on PF's shoulder.

14.17. CL was asked during cross examination about whether he made the comment "*don't start getting shitty with me*" as alleged. CL firstly said he had no recollection of saying this but then suggested that if he did say that, he did, conceding that he may have done. He admitted it would not be a professional comment in front of other employees. He denied that anything he said was done in an aggressive manner but that he and C had a short direct conversation. CL also denied that he said verbally during this conversation that all tasks needed to be completed before anyone left the following evening (stating that this was only said in his e mail and not during the conversation). When pressed on the precise words used by the C, CL said that C did not mention getting back in his car, initially responding that C said he would make it easy and 'go home'. He later said in response to another question that C had not mentioned going home but had said, 'I can get my bag and go'. CL contended that the differing use of phrases given in response to questioning by Mr Ratledge was caused by the pressure of the situation of Tribunal and was a 'slip of the tongue'. He acknowledged that when he said to C "*if you go then don't bother coming back*", that he did not clarify expressly that he would have no job to come back to (as this was in CL's view clear enough). He acknowledged that he did not state expressly where C had to go to and for how long before he had no job to come back to, but said he felt it was clear that if C left the premises (but not that office of itself) C had gone, decided to resign and that this would be classed as his resignation.

14.18. CL then said he telephoned CC to discuss what had happened and that PF was present during that call. He then sought advice from his employment law advisers, ELS

DB account of events

14.19. DB gave evidence that he was having a conversation with CL about Bulk Logistics at 9:30am when C arrived carrying a scanner and he did not give his usual good morning greeting and was looking serious. In his witness statement, DB gave exactly the same account of the conversation that then took place as CL did which is set out at paragraph 14.14 above. He then said that CL gave C time to consider his decision and that CL then went back to his desk at which time DB went over to CL's desk and asked to continue the discussion in a more civilised way stating that "*how C was communicating and acting wasn't conducive*" to this. DB told us that at around 9:45 that C picked up his bag and left he office and that he saw him put his hand on PF's shoulder before leaving. DB added in his witness statement that he did not feel this was a situation that needed to be diffused, that C was agitated but that CL was not "*biting back*" and was not "*extremely aggressive and abrupt*" in his manner and that C did not look to be humiliated or embarrassed. He also stated that the atmosphere was not toxic and tense but that C arrived "*obviously in a bad mood, appearing fed up*". He also added:

"Whilst not wholly focussing on the conversation between [CL] and [C] at this point I believe [CL] said something along the lines of "don't start getting shitty with me" to which [C] responded by saying something along the lines of "I'll make it easy for you and go home". Having focussed back on the conversation I then heard [CL] say something to the effect of "if you do that, then don't bother coming back, I'll give you 15 minutes to think about it"."

- 14.20. When questioned further about his account during cross examination, DB stated that C was *"not himself"* when he arrived that morning. He said that CL was not heated during the conversation with C but that he was behaving assertively and this was not unusual as there was sometimes pressure to get projects over the line with deadlines approaching. When asked if the conversation was elevated from both sides, he said that initially it was not and it was when he heard the exchange where CL said *"don't get shitty with me"* and C saying, *"I can make this easy for you"* that he started to pay more attention to the conversation as it escalated. He too felt that C said, *"I can make it easy, I can go"* and did not mention getting into his car. DB also said that whilst he saw C leave the top floor office and pat PF on the back, he did not see C leave the building. He told us he thought that C would be going downstairs and that he would go into a meeting room and it would be sorted out. He told us that about 45 minutes later he found out that C had left and someone told him *"Steve's gone"* and his reaction was *"What do you mean he's gone"*.

PF's account of events

- 14.21. PF was on the phone when C arrived for work and said on arrival C's demeanor was different and C did not say his usual good morning. When pressed, he said that he was not particular good at reading body language but agreed that C was agitated (as in worried) and looked in a bad mood and fed up. He said that CL and DB were discussing the Bulk Logistics project, but he was not really paying attention (as he was on a call using a headset) but noted that the conversation was *"getting louder"*. He did not recall CL using the words *"don't get shitty with me"* but noticed that words were exchanged. He heard C say something along the lines of *"I can make this really easy for you, I can just not be here"*. When pressed on how accurate his recollection was, he said he could not be sure but that was how his memory had served the account back to him acknowledging he had written this account for the first time a few weeks ago. PF told us that CL was not aggressive in his communication, and he did not raise his voice. He gave the Tribunal his opinion that if C felt embarrassed or humiliated about CL's questions that this was in part due to C having the truth about his shortfalls related to the project being exposed. PF was on another call at this time so did not hear the rest of the conversation but saw C get up and leave 10-15 minutes later and he took his bag and as he walked past him, put his hand on his shoulder and said something like *"I'll see you later"*. PF said he felt something before C left that made PF feel like C was about to leave, mentioning possible eye contact and because tensions were high at that point. PF said he was in no doubt that at the time C left the office, that C understood the decision made and he was not coming back. He accepted when pressed that C did

not say that to him or he never heard anything from C to indicated that he was not coming back. Whilst I found the account of NF to be broadly truthful, I did not find his observations about C's intentions to be of particular assistance, given firstly that PF was engaged during much of the conversation on telephone calls. I also find that PF's recollection may have been influenced by later events that day, given that shortly after C left, he was involved in the call between CL and CC after the event where the conversation was discussed.

Findings of fact on the disputed conversation

14.22. On the disputed parts of the conversation between the parties, my findings of fact are as follows:

- a) C was in an agitated state on arrival at the office at 9:30 am. I accept the observations of witnesses that he appeared in a bad mood and looked fed up and he did not behave in the manner he usually would (by greeting his colleagues).
- b) The conversation between C and CL was instigated when CL said in the direction of C and PF who were sitting opposite "*who is managing this project to ensure tasks are done and the solution is delivered on time?*". I find that CL was not shouting or raising his voice when he said this. However, I accept that C took this to be a stern and intimidating remark and in light of the e mails sent by CL earlier that morning (which his colleagues were not party to) when CL stated that all matters needed to be completed before any employee left the office the following evening.
- c) C responded to this by saying "*well, that's obviously me isn't it*". I find that C was not shouting or raising his voice, but this was said in an assertive manner, and this started to raise the temperature of the conversation which from then on became more tense on both sides.
- d) There was then an exchange between CL and C where CL emphasised the importance and urgency of the project and C explained that the project would not be completed on time. I find that during this part of the conversation CL did make reference to those involved in the project not leaving the office tomorrow until all tasks were completed. Whilst CL denied stating this during the conversation, I preferred C's evidence on this and given C's next comment made referencing the e mail sent earlier that day, I find that this comment about project completion and deadlines was indeed made.
- e) C interrupted CL and stated, "*well yes, I've seen your email this morning*".
- f) CL then said, "*Don't start getting shitty with me*". I find that this comment was made by CL. C clearly recalls this phrase and DB also gave evidence of such a comment being made. It is a striking comment and I find that this phrase in particular was one that was likely to stick in the mind of C and anyone who heard it. At this point

both parties were in a raised state, albeit not shouting and the conversation had become tense as indicated by the use of the phrase being made at all. CL was clearly reacting to what he felt was an unpleasant tone from C and this phrase of itself was one which was unprofessional and out of character to be used by CL.

- g) C then said, *“there’s an easy way to resolve this you know”* to which CL asked, *“what’s that?”* and C said, *“I can pick up my bag and go”*. I preferred the account of CL on the precise words used and this was supported by DB. Whilst C’s account was that he used the words, ‘I can get into my car’, I accept the submission of Mr Ratledge that the difference of words here and how recollected is really inconsequential as it the meaning of the phrase i.e. ‘I can leave’ is the same on both accounts.
- h) There is no real dispute of substance as to what CL then said, although I find that as alleged by C that CL in fact said: *“If you do that then don’t bother coming back, I’ll give you 15 minutes to think about it”*. The account of CL both in his contemporaneous record and in his evidence that he said *“if that is what you want to do then that is your choice, however, if you choose to do that, don’t bother coming back”* I found not to be a true recollection. I was not convinced that this slightly strained phrase represented the precise words used and find that CL added a slight gloss to the phrase both when recording his contemporaneous account (made after discussing things with his legal adviser) and in his evidence to the Tribunal. Neither C or DB record this comment as being said in this particular manner and it is a somewhat unnatural way of communicating in conversation (emphasising twice the use of the word choice). At this stage, whilst I find that CL was not shouting or raising his voice, he was engaged in an elevated and tense conversation with C and the words C (and DB) recall him using flow much more naturally than the more formal version of this phrase recorded by CL.
- i) C waited 10 minutes or so, then picked up his bag and walked out and on his way out, patted NF on the shoulder and said, *“see ya later”*. He then left the building.

E mail from CL to CC and ELS

14.23. At 10:46 am on 19 July 2023, CL sent an e mail to CC and Mr K Murphy, R, external employment law advisers (page 44-45) stating that he felt it would be beneficial to set out the timeline of events that morning. CL set out the background to events referring to a discussion on 17 July 2023 with the claimant and the e mails that had been sent and received that morning as referred to above. He set out in that e mail the same account of events that he gave as evidence in his witness statement above (but did not mention C patting PF’s shoulder rather stating that C drove away). In that e mail, CL also noted that the conversation between himself and C *“contained an element of heat but that heat was generated through [C]’s immediate response to the questions and subsequent pressured that was now being transferred to [C] as a result of the*

technology service being provided to Bulk Logistics falling under [C]'s team and his/their ownership".

Removal of access to systems

- 14.24. PF then suspended C's company account, reset the door fobs, arranged for locks to be changed and re-routed C's direct dial number from his desk phone to the main office number. C told us that his removal of access to the systems took place within an hour of his arrival home from work.

Telephone conversation with NH on 19 July 2023

- 14.25. At 12:10 pm C received a phone call from NH, a member of his team with a query about a web portal. NH told us that it was a short call and after the usual hellos, he asked C for assistance with his query and that C told him *"he couldn't help as he no longer worked for the company and that his access was already blocked so couldn't assist"*. NH did not ask further questions, but said he thought he wished C good luck and the call finished. NH said he then phoned someone at R's office (he could not remember who but possibly DB) and reported what had been said. CL then phoned NH shortly after and asked him some questions about the conversation. When asked further about this during cross examination NH said that he had called R because it was a strange phone call with C and so felt he should report it at which time he was *"told he had left"*. NH confirmed that the first time he had committed this account of events to writing was a few weeks ago when writing the statement. C gave a similar account of the phone call but he believed he simply told NH that he had walked out and that all his connectivity had been suspended and therefore could not help him; and that he did not tell NH that he no longer worked for R. I find that C told NH during this call that he could not help him as his access had been removed by R having walked out. I find that he did not in express terms tell NH that he had left the company or no longer worked there (although NH may have quite understandably assumed that from the conversation). I find it was in the subsequent conversations he had with R's employees straight after that he was informed that C had left. I do not find NH to have been in any way untruthful in his evidence but find that he is recounting the overall message he received from these two or three phone calls that took place within a very short period of time on that day.

Email from C to R on 20 July 2023

- 14.26. At 10:49 on 20 July 2023, C sent an e mail to CC headed SK employment (page 46) in which he started by saying:

"Although I did walk out yesterday after a heated exchange this action should not, necessarily, be taken as an automatic resignation."

He went on to state that he had not felt well for a few months and had felt worse this week and would have called in sick on 19 July 2023 were it not for the situation with Bulk Logistics. He said he intended to seek

medical advice and had a doctor's appointment next week and asked R to consider him off sick. He mentioned that his account had been suspended and also sent details of the scanner he had purchased earlier in the week and asked if the expense could be paid. He finished the e mail by saying:

"We clearly have a situation between [R] and myself and I would welcome the opportunity to resolve on your return from holiday next week."

There was some doubt as to whether this was received or not at the time sent by R but I noted at page 46 was a copy of a forwarded e mail from CC to CL and Mr Murphy at ELS at 11:58 on 20 July 2023 sending on that e mail. I was therefore satisfied that both CC and CL had seen this e mail by 12:00 on 20 July 2023. C resent that e mail later that day to CC at 19:51 (as he had not had a response and doubted whether it had been received) (see page 47).

Request for files

14.27. On 20 July 2023, C e mailed PF and asked him to send various files to him by e mail (page 49). C said this was because by this time he had no access to any of R's systems to be able to get these files. C also asked PF whether CC had seen the email he had sent. PF responded on the files and asked C whether he wanted him to nudge CC as she was on site to which C responded he did (page 48).

Response from R to C's e mail

14.28. On 21 July 2023, CC sent an e mail to C at 15:48 in response which was said to set out R's understanding of the situation (page 50-51). It gave a brief account of the incident and then stated:

"Craig informed you that if you chose to do this there is no coming back, he understood your words to mean that you would be resigning from your employment with us. He gave you some time to consider your next actions. Approximately 15 minutes later you got your bag and left site. We understood this as a clear and unambiguous resignation without notice and commenced procedures to protect the business including removing your access to our systems and changing the locks and key fobs on our office."

It went on to provide more details about the conversations C had with PF, and others stating that both PF and NH were on the understanding that employment had ended. It mentioned that he did not contact R that day and did not attend work the following day or comply with absence reporting procedures re sickness. It further added:

"Taking your actions together it is clear that you intended to resign from your employment, your actions were unambiguous and unequivocal."

14.29. C had a conversation with DB on the next day, Saturday 22 July 2023

in response to an earlier conversation DB had with D Banton. DB had informed D Banton that he would be happy to talk to C for a wellbeing discussion. C did call DB and there was a general discussion with DB stating that he was worried about C as this was not how he would normally behave. During the conversation C told DB that he had spoken to a legal representative and was also going to the doctors as he was feeling down about everything.

14.30. On 25 July 2023, C sent a further e mail to CC and CL (page 55) stating:

“I left to diffuse the situation as stated in my earlier email. I never stated that I intended to resign or that I was submitting my resignation.”

To which a response was provided on 26 July 2023 (page 56), reiterating R’s position stating:

“We have already set out our understanding of the events of 19 July 2023. However, by way of a reminder when we consider your actions as a whole, we are satisfied that your actions were unambiguous and unequivocal. We have accepted your resignation.”

The Relevant Law

15. Sections 94 and 98 of the Employment Rights Act 1996 (“ERA”) provides:

94 The right

An employee has the right not to be unfairly dismissed by his/her employer.

98 General

(1) In determiningwhether 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.

...

16. The key authority on how to approach cases of this nature where dismissal/resignation is disputed referred to by both parties was Omar v Epping Forest District Citizens Advice 2023 EAT 132. In this case the EAT reviewed all the case law concluding that there was in effect no ‘special circumstances exception’ to the general rule in the case of Sothorn v Franks Charlesly and Co 1981 IRLR 278, CA that unambiguous words of dismissal or resignation may be taken at their face value without analysing surrounding circumstances. It confirmed the position that a notice of resignation or dismissal once given cannot be unilaterally retracted (as per the authorities of Willoughby v CF Capital PLC [2011] EWCA Civ 1115, [2012] ICR 1038 and

Denham v United Glass Ltd UKEAT/581/98). It concluded that words of dismissal or resignation, or words that potentially constitute those matters should be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. It concluded that the words should be judged from the perspective of the reasonable bystander in the position of the recipient of those words i.e. the employer in the case of a resignation. It went on to state that the question is whether, viewing the situation objectively from that perspective, the person speaking the words not only used words that constituted words of resignation or dismissal, but also that objectively it would have appeared that he or she 'really intended' to resign or dismiss at the time they were said. The EAT noted that the uncommunicated subjective intention of the speaker is not relevant (although anything said by the speaker about their intention may be). The subjective understanding of the recipient is relevant, though not determinative, and evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended'.

17. Section 122(2) of the ERA provides:

Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), 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.

18. Section 123(6) of the ERA provides:

Where the tribunal finds 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.

19. Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - Software 2000 Limited v Andrews [2007] IRLR 568; the nature of the exercise is necessarily "broad brush" - Croydon Healthcare Services v Beatt [2017] IRLR 274; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274). In O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615, CA, the Court of Appeal held that where an employee had been found to have been unfairly dismissed on discriminatory grounds, it was permissible to limit the period of loss if there was evidence that employee would have been dismissed in any event for other lawful matters.

20. When considering contributory fault the conduct must be "culpable or blameworthy" - Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148. The Tribunal may take a very broad view of the

relevant circumstances when determining the extent of contributory fault - Gibson v British Transport Docks Board [1982] IRLR 228.

21. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) 1992 provides that in unfair dismissal cases where an employment tribunal concludes that an employer has unreasonably failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures, it may increase any award which it makes to the employee by up to 25%, if it is just and equitable in all the circumstances. In Holmes v Qinetiq Ltd [2016] ICR 1016, [2016] IRLR 664, Phoenix House Ltd v Stockman [2017] ICR 84, [2016] IRLR 848, and Rentplus UK Ltd v Coulson [2022] EAT 81, [2022] ICR 1313, guidance was given as to whether an uplift was appropriate in cases other than those where conduct or performance were the reasons for dismissal.

Conclusion

22. The key question in this claim was whether there was a dismissal in law (which would necessarily be an unfair dismissal in breach of contract in light of R's position as set out above). Both Mr Ratledge and Mr Randall very helpfully and eloquently addressed me on the guidance given by the EAT in Omar above, in particular the key passages contained at paragraph 97 onwards.
23. Mr Randall reminded the Tribunal that there is no such thing as a special circumstances exception, but the Tribunal must consider what is relevant and whether a resignation was properly given and really intended which in accordance with what was said by the EAT at paragraph 96 (6) (ii) of Omar must be considered objectively in all the circumstances. The pertinent question being would the reasonable bystander have understood what the claimant said to have been a resignation. He reminded me to take caution as to the comments about statements having been made in the right mind in that this did not mean that the resignation had to be reasonable, but it is a question as to whether what was said was what was really intended. He submitted that the exchange between C and CL made it clear to a reasonable bystander that C really intended to resign. R was under this impression that this was the case and acted on it and then set out its position in the e mail sent on 21 July 2023. R does not accept C's contention that this was a de-escalation of the situation as there were other ways in which this could have been done other than leaving the office and driving home. It contends that to a reasonable bystander the exchange between C and CL coupled with C walking out seen objectively amounted to unequivocal words of resignation. He submitted that these were simply unambiguous in that CL said if you leave, don't come back and C acted upon this and upon consideration he did leave. In relation to the heat of the moment issue, Mr Randall submitted that is only relevant in terms of whether that sheds light on whether C had an intention to really resign, and, in any event, R disputed that there was a particularly heated conversation. In terms of that intention R also pointed to the conversations post the incident with PF and NH which it says support the view that C intended to resign. He submitted that this was a decision to resign made knowingly at the time and the later position of C as set out in his e mail of 20 July 2023 was a change of mind upon reflection. At which time (it is

submitted) it was too late as C's resignation had already been accepted and acted upon. He submits that therefore following the authorities of Willoughby and Denham referred to in the Omar case, that resignation could not be retracted without the agreement of the other party

24. Mr Ratledge for C submitted that firstly there was nothing in the actual words used by C indicating at all he was intending to resign. He submits that C simply says, "*I can go*" and it is not clear at all that this means that he is at that point intending to permanently end his long-standing employment. He submits that those words show nothing other than an intention to leave the premises. Even taking into account what is subsequently said by CL, C submitted that this is an attempt by CL to impose additional categorisation of what C said that was not there. He submits that it is not within the gift of R to impose additional meaning on what C actually said. He submits that C is not by subsequently leaving accepting that additional meaning on what was actually said by C himself.
25. He then submits that in light of Omar para 97 (6) that it must be apparent to a reasonable bystander objectively that the other party (i.e. C) used words that when construed in accordance with normal contractual principles constitute words of immediate dismissal or resignation. Mr Ratledge submitted that the words used by C are simply not capable of meeting that test. He also submitted that it must also be apparent to a reasonable bystander objectively that the dismissal or resignation was seriously meant or really intended and that must be assessed at the time the words are spoken. He points out that it is clear that C never really intended by using the words "*I can go*" to bring an end to his employment. He submitted that it was a heated conversation at least from C's point of view and he was agitated. He also contends that the use of the words 'don't get shitty with me' indicated a degree of agitation on CL's part. It is clear he says that in those circumstances, C never really intended his act of walking out to be a resignation. He relies on paragraph 97 (11) of Omar as to what might be relevant in terms of whether the resignation was intended and points out these were the precise circumstances here i.e. C at least was angry and behaving on many accounts out of character. He points out that nothing was put in writing, despite C being employed with 25 years of unblemished and distinguished service and that very shortly after the incident C tried to clarify the situation with his employer.
26. I have considered the submissions carefully and in light of my detailed findings of fact above, I find that C did not resign his employment at the time of walking out of R's premises on 19 July 2023 following the conversation. I prefer on balance the submissions of Mr Ratledge and firstly conclude that as per his primary submission the words used did not amount to a clear and unequivocal indication of resignation. I refer to the guidance of Omar at paragraph 97 (7) that in the vast majority of cases, where words are used that objectively constitute words of dismissal or resignation, there will be no doubt that these are really intended then the analysis can stop there. The words used by the claimant as per my findings of fact (paragraph 14.22 g)) were not clear and unequivocal words of resignation. He never said the word 'resign', 'terminate my employment' or anything of that nature. He said, "*there's an easy way to resolve this you know*" and "*I can pick up my bag and go*" Therefore on that basis it is necessary to consider the objective meaning of

the words used to decide whether what was said or done showed that the claimant really intended to resign by using those words.

27. I accept the submissions of both that the time this assessment must be carried out is at the time at which the words were uttered and I must decide whether the words used constitute words of resignation construed objectively in all the circumstance of the case in accordance with the normal rules of contractual interpretation (para 97 (3) of Omar). I conclude that looking at this objectively from the position of the reasonable bystander in the position of the recipient of the words used (i.e. the employer) it was not apparent that firstly the words used constituted words of immediate resignation and nor was it apparent that the resignation was really intended. I conclude this for the following reasons:

27.1. As mentioned above C never used the word 'resign' or said he was terminating his employment. I accepted C's submission that C understood the words then said by CL, "*If you do that then don't bother coming back, I'll give you 15 minutes to think about it*" as something said in the 'heat of the moment'. C did not understand this to be a serious threat that his employment would be terminated if he did leave. That may very well have been the intention of CL in uttering those words, i.e. to give C an ultimatum, but this was not taken as such by C. C did not then say anything further to adjust the original meaning of the words C himself used to suggest that having heard CL's reply, this was understood and that by leaving C was in fact resigning. Had C, for example, said to CL something confirming that he understood what CL had said and was now leaving on this basis, things might have been different. However, this was not done. C uttered the words, "*there's an easy way to resolve this you know*" and "*I can pick up my bag and go*" and subsequently left without clear words being uttered saying that he intended to resign.

27.2. In terms of how the words used would objectively be apparent to a reasonable bystander in the receiving party's submission, then clearly the subjective perspective of CL is relevant as he was the other party to the conversation and the employer. He may well have understood the claimant to be resigning. However, I consider that firstly it was CL himself (not C) that introduced an element of permanence to C leaving by making the comment he did, "*If you do that then don't bother coming back, I'll give you 15 minutes to think about it*". This may have been CL's intention as to how CL would take C leaving should he have done so, but not necessarily instructive above that. There were clearly difficulties in the relationship certainly that day as evidenced by the terse e mails sent to the claimant very early that morning (see paragraph 14.8). CL was frustrated by what he saw were failings in the way C had handled this crucial project. Whilst CL was not shouting nor was he particularly aggressive as such, the conversation I conclude was heated on both sides. I conclude that CL's perceptions of what he saw and what he thought C intended by C's words are bound to have been skewed by this.

27.3. R points to what the others present at the time concluded and in particular what the understanding of PF was. However as referred to in our findings of fact, PF only had a partial understanding of what was

being said during the conversation as he was otherwise engaged (see paragraph 14.21). PF was also part of the management response to what took place and therefore his understanding is likely to have been influenced by what took place subsequently. In terms of DB's reaction, then he was of the view that when he saw C leave the office, he thought he had just gone downstairs and that the matter would be resolved at a later point. He expressed surprised when being told later in the day that C had gone (see paragraph 14.20). From DB's perspective at the time, it would seem it was not reasonably apparent that by him walking out C had really intended to resign his employment.

27.4. In addition, I also take into account the fact that I have found as a fact that C was in an agitated state on arrival in the office, which was noticed by 2 of his colleagues as being out of character (paragraph 14.22 c)). In addition, whilst denying that there was an argument or that CL was aggressive, both PF and DB note the slightly inflated nature of the discussions taking place. PF was distracted from his call to what was going on (paragraph 14.21). DB says he heard a number of the comments made and it is instructive that when CL walked away, DB suggested that the discussions should be carried on in a more civilised manner (see paragraph 14.19), suggesting that something out of the ordinary course of events was taking place. This sheds light on what a reasonable bystander might have understood what C is said to have meant and casts doubt on whether the words used constituted a real intention to resign, given his agitation and the heated discussion that took place.

27.5. Whilst the uncommunicated subjective intention of the speaker is not relevant, paragraph 97 (12) of Omar also makes it clear that any communication by the speaker in the relevant period thereafter as to what their subjective intention was will also be subjective evidence. C contended he was trying to deescalate the situation and informed R that he did not intend to resign on 20 July 2023 in his e mail sent and received by C by lunchtime the next day (paragraph 14.26). I took similar caution to this evidence as I did the subjective perception of CL, but it is still a relevant factor.

28. For the above reasons I conclude that it was not apparent to a reasonable bystander in the position of the recipient of the words used, objectively that the words used by C were immediate words of resignation. I also conclude that that resignation was not seriously meant or really intended by what took place during that incident, even taking into account the statements made by CL and the actions of C in deciding to get up and go.

29. As I have concluded he did not resign, I have considered how C's contract of employment came to an end and when this took effect. I consider that R's actions in immediately terminating C's access to its systems and also importantly its premises (by deactivating key fobs and taking the steps of changing its locks), was conduct that was clearly an act of repudiation of the contract (paragraph 14.24). C became aware of this at least in terms of access to R's systems on 19 July 2023 but I conclude that the termination of his contract of employment and accordingly his dismissal was communicated

to C when he was sent the e mail by CC on 21 July 2023 (paragraph 14.28). By this time R had received the e mail from C stating that he felt he had not resigned, and it reiterated the position held that he had and acted to bring an end to the contract of employment at this time. C was dismissed as of 21 July 2023.

30. Accordingly, I also find that C was dismissed unfairly and was dismissed in breach of contract
31. The claimant does not seek reinstatement or re-engagement, so I proceeded straight to consideration of the award to be payable to the claimant as set out in the list of issues above.

Polkey and Contribution

32. Firstly, I considered whether any adjustment should be made to the any compensation that may be awarded to C on the grounds that his employment would have ended sooner in any event . R submits that the issues arising around C's performance and contribution to the Base Logistics project would have led to a performance management review which may have led to termination. He referred me to the O' Donoghue case in support of this position. However I was not able to make a finding of fact that this was or would have been the case given that no such action had been commenced (nor did we hear any evidence that it was about to be) and also in the claimant's position in the company and seniority, I conclude this was unlikely to have been the case. For these reasons, no reduction on the basis of a Polkey type scenario is appropriate.
33. When considering a deduction to the basic or compensatory award on the basis of contribution. Firstly, it is necessary to identify the conduct which is said to give rise to possible contributory fault. Secondly, I must decide whether that conduct is blameworthy. Thirdly, under section 123(6) ERA, I should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally I must determine to what extent it is just and equitable for the award to be reduced. R does not in fact submit that any adjustment should be made for contribution and I conclude that that is the correct position. R had not identified any conduct said to be blameworthy which caused or contributed to dismissal and thus I do not find it appropriate to make any adjustment to the basic or compensatory award

ACAS uplift

34. C also sought a 25% uplift as it states that the respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedure ('ACAS Code'). R says this is not applicable given the circumstances of what has now been found to be a dismissal (but was not regarded as such at the time) and therefore it was not unreasonable for R to follow the provisions of the ACAS Code. I preferred the submissions of R on this matter and I did not make any uplift for failure to comply with the ACAS code of practice. I take note of the authorities on this matter that the ACAS Code is not applicable where there is no suggestion of a disciplinary offence or any application of a complaint or action that might lead to disciplinary action at the time (see Holmes and the

Stockman cases above). I find that the ACAS code did not apply to the circumstances here (as there was not a disciplinary offence or performance problem in consideration at the time). In any event given that R was acting on the incorrect assumption that C had resigned any failure to comply with the provisions of the ACAS Code was not unreasonable.

35. Following a discussion with the parties, I made the basic and compensatory awards to C as set out above and calculated in accordance with the information in the Appendix attached.

**Employment Judge Flood
3 May 2024**

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

Appendix

Calculation of compensation for unfair dismissal

Basic Award

At dismissal on 20 July 2023, C was aged 64 with 25 complete years of service. His (agreed) gross weekly pay was £832.96.

30 x £643 (capped weekly pay in place at relevant time) = £19,290

Total Basic Award **£19,290**

Compensatory Award

Loss of statutory rights £500

Net weekly earnings figure (agreed) £715.48

Period of financial loss (agreed) 53 weeks from date of dismissal until 28 July 2024 (retirement date)

53 x 715.48 = £37,920.44

Total compensatory award (before grossing up) £38,420.44

Grossing up

Amount of compensatory award included within the remaining amount of the £30,000 tax free element once basic award considered:

£30,000 - £19,290 (basic award) = £10,710

Amount of compensatory award that should be taxed:

£38,420.44 - £10,710 (tax free sum) = £27,710.44

Deduct unused personal allowance (no tax applied) -£12,570

Sum to be grossed up £15,140.44

Grossed up at 20% (as within applicable lower rate tax band limit of £37,700)

£15,140.44 / 80 x 100 = £18,925.55

Add back tax free sums included in total award:

Balance of £30,000 (after basic award) £10,710

Personal allowance £12,570

Total compensatory award (after grossing up) **£42,205.55**