



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Lee Stainton

**Respondent:** John E Haith Limited

## Record of a Hearing at the Employment Tribunal

**Heard at:** Nottingham

**Heard on:** 29 February 2024

**Before:** Employment Judge Hutchinson (sitting alone)

### Appearances:

**Claimant:** Mr O'Keefe, Counsel

**Respondents:** Miss Evans-Jarvis, Solicitor

**JUDGMENT** having been sent to the parties on 27 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013 the following reasons are provided.

# REASONS

## Background to this Claim

1. The Claimant presented his claim to the Tribunal on 25 September 2023. He had been employed by the Respondent as a Factory Operative from 28 October 1991 to the 26 July 2023.
2. His claims are:
  - Unfair dismissal.
  - Redundancy payment.
  - Wages.
  - Holiday pay.
  - Notice pay.
3. The claim for holiday pay was withdrawn and dismissed.
4. As explained in his claim form, he had originally worked at the Cleethorpes factory and this was subsequently moved to Grimsby where he was able to ride his bicycle to and from work.
5. He was informed in 2023 that the factory was to move to Louth and the Respondent's sought to enforce an amendment to his contract which he would not agree to. The reason he would not agree to the move was because he thought he was redundant and when the Respondent closed their premises in Grimsby he would not move to Louth.
6. He was disciplined in respect of this and then dismissed.
7. The Respondent's say that the move to Louth was reasonable and relied on his contractual provision. They say that he had unreasonably refused to move and subsequently he was absent from work without authority and that he had failed to comply with a reasonable instruction to transfer to Louth.
8. The Respondent say that the reason for dismissal was conduct and that his dismissal was substantively and procedurally fair.

### **The Issues**

9. It is not in dispute that the Claimant was dismissed. It is for the Respondent to establish the reason for the dismissal and that it was a potentially fair reason. In this case the Respondent says the reason for the dismissal was conduct. If they satisfy me that was the reason for the dismissal, I must go on to consider whether the dismissal was reasonable in accordance with the principles set out in section 98(4) of the Employment Rights Act 1996 (“ERA”).
10. If the Claimant is successful with the claim I will have to go on to consider what losses he has sustained as a result of his unfair dismissal, I would also have to consider whether there should be any reduction in his compensation because of contributory conduct or because the claimant would have been dismissed fairly if a fair procedure had been followed in a case where I thought that the dismissal was procedurally unfair.

### **Evidence**

11. I heard evidence from:

- The Claimant.
- Nicki Parratt, Head of HR.

12. There was an agreed bundle of documents, and I also had the benefit of both written and oral submissions from the parties. There was no real dispute about the facts of the case.

### **The Facts**

13. The Respondent is a Seed and Grain Merchant now based in Louth. It was formerly located in Grimsby and before that in Cleethorpes.
14. The Claimant was employed as a Factory Operative and commenced his employment on 28 October 1991.
15. He originally worked 40 hours per week but in 2006 this was reduced to 32 hours per week. He was paid the National Minimum Wage.
16. His wife suffers from multiple sclerosis and the Respondents were aware of this. He is the primary carer for her. They have 4 children the youngest of whom is 15.
17. When the Grimsby factory was open the Claimant lived 4.3 miles from his work, and he could cycle to work and back each day.
18. The Claimant’s contract of employment is dated 3 August 2010 and is at pages 43 to 50 of the bundle.

19. His place of work provision is as follows:

*"You are based at the above address or any current or future Company site within reasonable travelling distance of this address".*

20. The Companies Grievance Procedure, Disciplinary Rules and Procedure are dated 1 November 2010 are at pages 51 to 56.

21. In November 2021 the Respondent's Directors told staff that they would be relocating the factory to Louth which is 15.8 miles from the Claimant's home.

22. The Claimant does not drive. The Claimant could learn to drive if he could afford to do so which he couldn't, and the Respondent did not offer any support in respect of him learning to drive.

23. The Respondent's Directors had indicated the possibility of a bus service but there were no specific proposals every made in respect of that.

24. On 28 February 2023 a letter was issued to the Claimant and other employees which is at page 59. It says:

***"Notification of Amendment to Contract***

*"Following our discussions about the changes which the organisation are making in order to operate more efficiently, I am writing to confirm our agreement that as from 27 March 2023 your new address for employment will be Haiths, The Bird Food Centre, Bollingbrooke Road, Fairland Industrial Estate, Louth, Lincs, LN11 0WA.*

*Please sign and return one copy of this letter to me. You should keep the other copy with your contract of employment as it constitutes a variation of terms.*

*If you have any queries about this change, please let me know and I will do my best to resolve them.*

*I would like to thank you for your co-operation in arriving at these changes.*

*Yours sincerely*

*Andrea Parratt*

*Head of HR"*

25. There had been no discussion with the Claimant or any of the affected employees prior to this letter being sent.

26. The Claimant met with Andrea Parratt on 1 March 2023 and a note of the meeting is at page 60.

27. In that meeting he explained that he did not wish to go to Louth.

28. He did not wish to rely on others to take him to work because he could not rely on others. They might be off sick, have car problems, or be on holiday.
29. He explained that transferring to Louth would mean that there would be considerable extra hours to get to work via bus which would add 1 hour 40 minutes on the morning and the same in the evening.
30. He explained that his wife had MS and is not always stable and needs to have him close by and he might need to get back to her at short notice.
31. In the circumstances he asked that he should be made redundant.
32. Miss Parratt responded to those matters by way of a letter dated 6 March 2023. The letter is at pages 61-62. The letter explained the reason for the transfer of the Respondent's business and did not respond to the concerns of Mr Stainton. It said:
- "However, I am now writing to confirm that while we appreciate your position and want to continue working with you to find a mutually acceptable solution, we still maintain that the above changes our essential needs of our business. In view of this I would like to arrange a further formal meeting to discuss these issues on Tuesday 14 March 2023 at 10.00am at the offices of John E Haith in Grimsby".*
33. It went on to say:
- "I need to make clear that if no agreement is reached, we will enforce a change to your terms and conditions as active from 27 March 2023".*
34. That meeting took place on 14 March 2023 and the notes of the meeting are at pages 63-67. At the meeting the Claimant was represented by a trade union official.
35. He explained his position which he had previously discussed with Andrea Parratt on 1 March.
36. Miss Parratt said that they might put on a bus to Louth with a choice of 3 pick-up/drop off points and it would be provided for a period of 12 months.
37. She also mentioned the possibility that they might offer a contribution for the difference in mileage for the first 12 months.
38. It was emphasised in respect of each of these matters that it would only be for a period of 12 months and that they would review the situation. Mr Stainton was unhappy about the Company's position and did not agree that any of the proposals made were reasonable and he therefore raised a grievance on that date which is at page 68-70.
39. In his letter of grievance, he set out that he had been a loyal worker for the Respondents for over 30 years and explained that his wife had MS and needed his support and that he would not be able to give her that support if he had to travel to Louth each day. This would put a considerable extra time to his working day and that

he did not feel that he could rely on others he explained that he couldn't continue with his employment for the Respondent with their move to Louth.

40. On 16 March 2023 Miss Parratt wrote back to the Claimant (pages 71-3).
41. In the letter she said that the Respondents had made reasonable adjustments to support him, and the decision of the Company was that they would enforce the change to his terms and conditions as from 27 March 2023. If he wanted to appeal against the decision, he had to set out his appeal in writing by 22 March 2022.
42. On 17 March 2023 Miss Parratt wrote again to Mr Stainton (pages 74-5) informing him that the letter of grievance had been handed to her prior to receiving the outcome and the decision to enforce the change at the meeting held on 14 March. She queried therefore whether he was raising a grievance in accordance with the Company's Grievance Procedure.
43. Mr Monaghan, the trade union representative wrote to Miss Parratt on 20 March 2023 (page 76) saying that the Claimant had submitted a formal grievance because it was unreasonable to require him to compulsorily relocate to Louth.
44. On 27 March 2023, Mr Stainton attended the old premises and spoke to Miss Parratt to say that he would not be transferring to Louth. This was done on the advice of his trade union.
45. On 30 March 2023 Miss Parratt wrote again to Mr Stainton. The letter is at page 86. It accused him of being absent from work since 27 March 2023 and he was told that he was required to contact her by 3 April to discuss the situation. She accused the Claimant of unauthorised absence and said that this was unacceptable and that they would commence disciplinary action against him if this continued.
46. On 31 March 2023 Mr Stainton replied at page 87.
47. He explained that he was not going to transfer to Louth and again said that he was hoping that the Respondent would make him redundant.
48. On 3 April 2023 he wrote again to Miss Parratt saying that he had no intention of transferring to the new premises at Louth (page 88).
49. On 12 April 2023 Miss Parratt wrote to the Claimant (page 89-90) saying that he was absent from work, that his absence was unauthorised and required him to contact her by 17 April to discuss the situation. She said that she would make him subject to disciplinary action.
50. On 18 April 2023 Miss Parratt again wrote to the Claimant (pages 91-92). She now required him to attend a disciplinary hearing on 25 April 2023 about:
  - 50.1. His persistent and unexplained absence from work since 27 March 2023.
  - 50.2. His failure to respond to a reasonable written management request on 12 April

to contact the Respondent by 17 April to discuss his unauthorised absence.

51. On 21 April the Claimant responded to the letter saying that he would not attend the meeting.
52. On 26 April 2023 Miss Parratt sought to reschedule the meeting to 3 May 2023 (page 93).
53. On 2 May 2023 the Claimant's Solicitor wrote to Miss Parratt (pages 99-101) to say that the Claimant would not be attending and that the meeting should be vacated.
54. On 3 May 2023 Miss Parratt wrote to the Claimant dismissing him on the grounds that:
  - 54.1. He had been absent from work since 27 March 2023.
  - 54.2. He had failed to respond to a reasonable written management request to contact his employer to discuss his unauthorised absence.
  - 54.3. He had failed to attend the disciplinary hearing on 25 April 2023.
55. He was dismissed with notice, with his employment terminating on 26 July 2023.
56. He was told that he would have a right of appeal.
57. On 15 May the Claimant's Solicitor wrote to Miss Parratt informing her of Mr Stainton's intention to appeal the decision. No appeal hearing was ever convened, and the Claimant was not paid from 27 March 2023 until the termination of his employment on 26 July because of his alleged unauthorised absence.

## **The Law**

### **Unfair Dismissal**

58. Section 139 the ERA provides as follows.

“For the purposes of this act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to.

(a) the fact that his employer has ceased or intends to cease-

(i) to carry on the business for the purposes of which the employee was employed by him or

(ii) to carry on that business in the place where the employee was so employed”

if the employee is dismissed by reason of redundancy, they are entitled to a redundancy payment. The employee is presumed to have been dismissed by reason

of redundancy unless the contrary is proved.

If the employee is dismissed not by reason of the employer ceasing to carry on business and the place where the employee was employed for failing to follow a management instruction to work in a different location or a new location, they will not be entitled to a redundancy payment.

59. The claim of unfair dismissal is made under section 98 of the ERA. Section 98 provides:

(1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:*

(a) *The reason (or if more than one 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.*

(2) *A reason falls within this subsection if it:*

(a) *...../*

(b) *Relates to the conduct of the employee.*

(3) *...../*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) *Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *Shall be determined in accordance with equity and the substantial merits of the case."*

60. I was also referred to the case of ***Kellogg Brown and Root (UK) Limited v Mr D Fitton and Mr P Ewer UKEAT/0205/16BA and UKEAT 0206 16 BA.***

61. The case was like the circumstances pertaining to Mr Stainton.

62. That reminded me that whether or not there was a redundancy situation I had to approach the question of the reason for the dismissal applying the test laid down in ***Abernethy v Mott, Hay and Anderson [1974] ICR 323 CA.***

63. As in that case it is the Respondent's case here that the reason for the dismissal related to the Claimant's conduct which was the refusal to obey the instruction to relocate.



64. If the employer satisfies me that that was the reason for the dismissal, I have to go on to consider the question of fairness. In doing so I have to apply the three-stage test identified by Her Honour Judge Eadie QC in that case namely:

64.1. Whether the instruction was lawful (whether the mobility clause relied on was contractual).

64.2. Whether the Respondent had acted reasonably in giving that instruction.

64.3. Whether the Claimant had acted reasonably in refusing to comply with that instruction.

### **My Conclusions**

65. I am satisfied in this case that the reason for the dismissal was the Claimant's conduct. In particular:

65.1. His persistent and unexplained absences.

65.2. His failure to follow a reasonable management instruction.

65.3. His failure to attend a disciplinary hearing.

66. I am satisfied that the mobility clause in the Claimant's contract was too wide and uncertain. That moving to Louth and requiring the Claimant to do so was unreasonable. Moving to Louth was not in any event within reasonable travelling distance of his previous place of employment because it would involve a substantial increase in his travelling time and would prevent him from caring for his wife who suffers from MS.

67. The move to Louth was not a lawful instruction. It was an imposed non-consensual variation to the claimant's terms and conditions of employment. The imposition was made without proper consultation or consideration of the claimant's personal circumstances.

68. The Claimant had not been guilty of persistent and unexplained absence.

69. He had worked for the Respondent for 31 years loyally and quite reasonably could not agree to transfer his employment to Louth.

70. Louth is more than 14 miles from the Claimant's home and the Claimant would have to rely on public transport namely a bus which would involve 1 hour 40 minutes extra travel time each way to work.

71. The Claimant was only in receipt of minimum wage working just 32 hours per week and could not afford a car or driving lessons when he had wife who suffered from MS and 4 children to support.

72. I am satisfied it was reasonable for him to refuse to transfer to Louth. Whilst the

Respondent had suggested various alternatives it was made clear that those alternatives were always on a temporary basis and were not a long-term solution.

73. I am satisfied in particular:

73.1. The instruction to move to Louth was not lawful and that the mobility clause being sought to be relied on was too vague and unreasonable.

73.2. The Respondent had not acted within the band of reasonable responses in giving that instruction and that the Claimant had acted reasonably in refusing to comply with instruction particularly bearing in mind the Claimant's personal circumstances which the Respondent's ignored.

73.3. The respondent's behaviour in requiring him to attend a disciplinary hearing in the circumstances was not reasonable. I am satisfied that he was entitled to decline to attend such a meeting which would have been a waste of time in any event.

73.4. There were no unexplained absences. I am satisfied that his behaviour was reasonable in all the circumstances and did not justify his dismissal.

74. I am satisfied that the Claimant was unfairly dismissed and that I should make an award of a basic award only. No compensatory award should be made because I am satisfied that the Respondent should have dismissed the Claimant on the grounds of his redundancy.

75. The Claim for a redundancy payment does not succeed and is dismissed.

76. The Claimant was not paid his wages for the period between 27 March and 3 May and there has been an unlawful deduction of his wages.

77. The Claimant was dismissed on 3 May 2023 and was entitled to 12 weeks' notice. By not paying him his notice period the Respondents have breached his contract of employment.

### **Remedy**

78. The Claimant is entitled to a basic award. His gross pay was £304.00 per week. At the effective date of termination, the Claimant was 53 years old and had 31 years' service.

79. His basic award is therefore 26 x £304.00 equals £7,904.00.

80. His unlawful deduction of wages is for a period of 5 weeks from 27 March to 3 May 2023 and is at £304.00 per week which equals £1,520.00 gross.

81. The Claimant was entitled to 12 weeks' notice when he was dismissed on 3 May 2023. His net pay was £278.17 which amounts to £3,338.04.

82. The total award the Respondent must pay to the Claimant is £12,762.04.

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Employment Judge Hutchinson

Date: 20 June 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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