



EMPLOYMENT TRIBUNALS

FINAL HEARING

Claimant Mr I S Walmsley

Respondent W. G. Bradwell Limited

Heard: Remotely by video **On:** 14 April 2022

Before: Employment Judge Stephen Shore

REPRESENTATION:

Claimant: In Person

Respondent: Mr A Willoughby, Counsel

JUDGMENT AND REASONS ON LIABILITY

The judgment of the Tribunal is that:

1. The correct name of the respondent is W. G. Bradwell Limited and the Tribunal records shall be amended accordingly.
2. The respondent did not unfairly dismiss the claimant. The claimant's claim of unfair dismissal fails.
3. As the respondent did not dismiss the claimant at all, his claim for failure to provide written reasons for dismissal fails.

REASONS

Brief Background and History of this hearing

1. The respondent, W. G. Bradwell Limited operates in the freight transport sector.

2. The claimant was employed as an HGV Driver by the respondent from 18 July 2016 to 2 May 2018 and then from 17 September 2018 to either 27 October 2021 (respondent's case) or 30 October 2021 (claimant's case), one of which was the effective date of termination of his employment. No claim is made in respect of the claimant's first period of employment.
3. The claimant brings a claim of unfair dismissal and of failure to provide written reasons for dismissal.
4. The claimant began early conciliation with ACAS on 4 November 2021 and obtained a conciliation certificate on 15 December 2021. His claim form (ET1) was presented on 17 December 2021.
5. The relevant chronology of the case begins on 21 October 2021. The claimant had worked on 20 October 2021 and had slept in his HGV in a lay by on the A38 that night. He says that about 5:50am on the morning of 21 October 2021, another HGV, which was travelling quickly, hit his HGV, which was stationary.
6. At the moment of impact, Mr Walmsley says that he had just stepped into the cab of his vehicle and was pulling the door on the offside of the vehicle to close it from the inside at the moment of impact. The impact forced the door out of his grasp and flung the door forward on its hinges. The door was damaged, but the vehicle remained safe to use.
7. Mr Walmsley decided to continue his working day and rang Mr Mather about the incident at approximately 9:30am on 21 October. The vehicle was inspected by Mr Mather at the respondent's yard on 23 October 2021. Mr Walmsley completed an insurance report about the incident that was signed off as true by Mr Mather on 25 October 2021.
8. The vehicle was then sent to Thompsons Commercials Ltd for an assessment of the damage on 27 October 2021. Mr Mather says that Mr Havercroft of Thompsons Commercials Ltd reported back to him on the morning of 27 October and cast doubt on the claimant's account of the incident.
9. Mr Walmsley and Mr Mather then met briefly at the respondent's yard on the afternoon of 27 October. Mr Walmsley says that Mr Mather suspended him and he cleared his personal effects from his vehicle. Mr Mather agreed with that part of the claimant's account, but went on to say that the claimant verbally resigned his employment before leaving the respondent's premises.
10. There were no preliminary hearings in this case, which is unfortunate, as a preliminary hearing could have dealt with some of the questions in the case at an early opportunity, rather than them having to be dealt with at the final hearing. No fault lies with either of the parties or their representatives for not dealing with matters such as a list of issues before the hearing.

Housekeeping

11. The hearing was conducted remotely by video link. Neither party objected to this method of hearing.

12. I noted that the claimant was representing himself. I advised him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. Rule 2 says:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

13. I also advised both parties that I would initially deal with liability in the case (whether or not the claimant had been unfairly dismissed and whether any deduction to compensation should be made because of his conduct or because the dismissal had been procedurally unfair, but may have been fair if a fair procedure had been followed). Because of my decision on liability, there was no requirement for me to consider remedy.
14. The parties had agreed and prepared a bundle of 89 pages. If I refer to any document in the bundle, I will put the page numbers in square brackets (e.g. [34-35]). If I refer to a paragraph number, I will use the silcrow symbol ‘§’ with the paragraph number (e.g. paragraph 27 would be expressed as ‘§27’).
15. The claimant confirmed that his only claims were of unfair dismissal and failure to provide written reasons for dismissal.
16. No list of issues had been agreed, so I went through the issues (questions that had to be answered) with the parties and sent an agreed list to them (see below).
17. I made an order changing the name of the respondent to W. G. Bradwell Limited by consent.
18. I heard evidence via video link from (in the order that they gave evidence):
- a. Ian Walmsley, the claimant. His witness statement dated 15 March 2022 consisted of 18 paragraphs.

b. Derry Mather, Managing Director of the respondent. His witness statement dated 11 March 2022 consisted of 42 paragraphs.

19. Both parties were given the opportunity to cross-examine witnesses. The respondent's representative was given the opportunity to re-examine their witnesses. The claimant was given the opportunity to amplify or clarify any of the answers he had given to cross-examination questions at the end of his evidence, as he did not have a representative who could have asked re-examination questions.

20. At the end of the evidence I heard closing submissions from both parties. At the end of closing submissions, I took a break to consider my decision, which I delivered at 3:30pm on the afternoon of the hearing. Mr Walmsley asked for the reasons in writing.

Issues

21. The following issues were agreed by the parties:

1. Unfair dismissal

1.1 *Was the claimant dismissed? The claimant says he was dismissed. The respondent says that the claimant resigned.*

1.2 *What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*

1.3 *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*

1.3.1 *there were reasonable grounds for that belief;*

1.3.2 *at the time the belief was formed the respondent had carried out a reasonable investigation;*

1.3.3 *the respondent otherwise acted in a procedurally fair manner;*

1.3.4 *dismissal was within the range of reasonable responses.*

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 if a fair procedure had been followed, or 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?*
- 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 he 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 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. Failure to provide written reasons for dismissal

- 3.1 *Did the respondent fail to provide the claimant with written reasons for dismissal when required to do so contrary to section 92 of the Employment Rights Act 1996?*

22. Because I found that the claimant was not unfairly dismissed and had not been dismissed at all, I did not consider any issues from paragraphs 1.2 to 2.3 above.

Relevant Law

23. In unfair dismissal claims, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

(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, 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.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

24. The law relating to the right of an employee to a written statement of reasons for dismissal is set out in section 92 of the Employment Rights Act 1996, the relevant parts of which are set out here:

"Section 92: Right to written statement of reasons for dismissal.

(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—

(a) if the employee is given by the employer notice of termination of his contract of employment,

(b) if the employee's contract of employment is terminated by the employer without notice, or

(c) if the employee is employed under a limited-term contract and the contract terminates by virtue of the limiting event without being renewed under the same contract.

(2) Subject to subsections (4) and (4A), an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.

(3) Subject to subsections (4) and (4A), an employee is not entitled to a written statement under this section unless on the effective date of termination he has been, or will have been, continuously employed for a period of not less than two years ending with that date.

Findings of Fact

25. All my findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over another. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.
26. Some of the facts in this case were never disputed. The key disputes of evidence in this case were around the events of 21 October 2021 and 27 October 2021.

Agreed Facts

27. I find that the following facts were either agreed or never disputed:

- 27.1. The respondent, W. G. Bradwell Limited operates in the freight transport sector.
- 27.2. The claimant was employed as an HGV Driver by the respondent from 18 July 2016 to 2 May 2018 and then from 17 September 2018 to either 27 October 2021 (respondent's case) or 30 October 2021 (claimant's case), one of which was the effective date of termination of her employment.
- 27.3. The claimant began early conciliation with ACAS on 4 November 2021 and obtained a conciliation certificate on 15 December 2021. His claim form (ET1) was presented on 17 December 2021.
- 27.4. The claimant had worked on 20 October 2021 and had slept in his HGV in a lay by on the A38 that night. At some point, the claimant's HGV sustained damage to the offside cab door as evidenced by photographs in the bundle [68-71].
- 27.5. The door was damaged, but the vehicle remained safe to use.
- 27.6. Mr Walmsley rang Mr Mather about the incident at approximately 9:30am on 21 October. The vehicle was inspected by Mr Mather at the respondent's yard on 23 October 2021. Mr Walmsley completed an insurance report about the incident that was signed off as true by Mr Mather on 25 October 2021 [55-60].
- 27.7. The vehicle was then sent to Thompsons Commercials Ltd for an assessment of the damage on 27 October 2021.
- 27.8. Mr Walmsley and Mr Mather then met briefly at the respondent's yard on the afternoon of 27 October. It was agreed that Mr Mather suspended Mr Walmsley and the claimant then cleared his personal effects from his vehicle and handed in his fuel card and vehicle keys.

Disputed Facts

28. I preface my findings on the disputed facts with a few comments about the case and evidence in general:

- 28.1. I empathise with the claimant's depth and strength of feeling about what happened to him in October 2021. His evidence, however, was heightened and he expressed himself in terms that were very emotive. There were occasions when he had to row back from strongly expressed opinions that he had to accept were not based on fact;

- 28.2. The two central issues in the case, how the HGV that the claimant drove was damaged on 21 October 2021 and what was said and done at the respondent's yard by Mr Walmsley and Mr Mather on 27 October 2021 were difficult to determine, because there was little indisputable evidence, such as CCTV footage; and
- 28.3. My findings favoured the respondent's case for the reasons I have set out below, but I found the task of determining the key disputed facts to have been very difficult.
29. I find that nothing concerning the claimant's first period of employment with the respondent has any relevance to the issues I had to determine. The claimant's witness statement (§1) contained an allegation that he had been "callously dismissed due to my late wife's terminal illness". Mr Mather provided an explanation for the dismissal that rebutted the suggestion and the claimant did not maintain the allegation.
30. The claimant's witness statement also referred to a colleague at the respondent called John Brennan (§5), who he had suggested had been in a similar situation to his, but had given little detail of how their circumstances were similar. In answer to supplementary questions from Mr Willoughby, Mr Mather said that Mr Brennan had been involved in a road traffic collision in which a van had driven into the side of his vehicle. Mr Mather had suspended him. Mr Brennan had then said that if Mr Mather didn't believe him, he'd quit.
31. Mr Mather said that he then told Mr Brennan that he had CCTV footage of Mr Brennan going through a red light and Mr Brennan resigned. Mr Mather confirmed that the claimant had raised Mr Brennan's case when he had been suspended on 27 October 2021. The claimant asked no questions of Mr Mather about his account, so I find that he accepted the account given. I find Mr Mather's account of Mr Brennan's case to be credible.
32. I find that the claimant did not show on the balance of probabilities that the damage to his vehicle occurred in the way he described. I make that finding for the following reasons:
- 32.1. I find that the claimant's drawing of the position of his vehicle in the lay by on the A38 in the insurance report [60] seems to show that the vehicle was parked right up against the edge of the lay by that was farthest away from the carriageway. I appreciate that the drawing is not to scale, but I find it more likely than not that the vehicle door would not be in a position to be hit by a passing vehicle, as the claimant alleges;
- 32.2. I find that Mr Walmsley was vague about the speed that the HGV that allegedly hit his vehicle was going. There was a dispute about whether claimant said the HGV was going "full pelt". In his witness statement (§4) he accepted that it could have been going "flat out". I find there is no material difference in those two descriptions.

- 32.3. The claimant was adamant that the other HGV made physical contact with his vehicle and that there was also a considerable draft of air as the vehicle passed. He said his door was open about 8 to 10 inches. The result was that the door was flung open.
- 32.4. I take judicial knowledge (a body of information that the Tribunal is aware of and therefore does not have to be proven) that an HGV weighing several tons that hit the open door of another HGV would have caused much more damage than was indicated in the photographs produced [68-71] and as detailed in the repair invoice for the vehicle [61-62];
- 32.5. I appreciate that Mr Walmsley was the only person who actually witnessed the incident, but I found his description in the insurance report [55-60], his witness statement and his oral evidence to be vague;
- 32.6. It is regrettable that there was no dashcam footage available. I accept Mr Mather's evidence that the dashcam in Mr Walmsley's vehicle recorded to an SD card that had limited memory and which recorded over previous footage when full. I found his evidence that when he removed the SD cards on 23 October, there was no recorded footage from before approximately 12:30pm on 21 October to be credible. I make that finding because Mr Walmsley was unable to contradict Mr Mather;
- 32.7. I find that Mr Walmsley's credibility is damaged by his failure to contact Mr Mather to report the potentially serious incident until approximately 9:30am. I do not find his reason, that he wanted to complete his work, to be credible. Mr Mather gave uncontradicted evidence that he is usually available by phone from 5:00am in the morning;
- 32.8. I find it unlikely that an experienced driver such as Mr Walmsley would choose to make 3 deliveries before contacting his boss about an accident;
- 32.9. I find that Mr Mather had well-founded suspicions about Mr Walmsley's account on 23 October 2021 because his evidence on the point was not challenged;
- 32.10. I take into account the fact that Mr Mather signed off the claimant's account of the incident in the insurance report dated 25 October 2021 [55-60]. It may have been unwise to do so, but I accept his evidence as credible that his suspicions did not crystallise into something that required him to start a disciplinary process against the claimant by suspending him until he had received the verbal feedback from Mr Havercroft on 27 October;
- 32.11. I find Mr Mather's recollection that Mr Havercroft said that the damage to the claimant's HGV was not consistent with the incident

that the claimant had described and that the damage was consistent with a driver reversing with the door of the cab open and colliding with an obstruction to be credible. I make that finding because I found Mr Mather to be credible in general; the Tribunal can accept hearsay evidence and the evidence was consistent with Mr Havercroft's email of 31 January 2022 [66-67]. In making that assessment, I considered the lack of any mention in the email of the theory that the damage had been caused by a driver reversing with the cab door open, but that did not invalidate the main finding, which was that the damage was unlikely to have been caused by the incident that the claimant described; and

- 32.12. I find Mr Havercroft's email of 31 January 2022 to be credible and supportive of the respondent's position. It also undermines the credibility of the claimant's case on this point.
33. I find that on 27 October 2021, the claimant quit his job after being told that he was suspended by Mr Mather. His effective date of termination was 27 October 2021. I make that finding because:
- 33.1. Following from my findings about how the claimant's HGV was damaged, I find that it was reasonable for Mr Mather to have suspicions about the truth of Mr Walmsley's account and that an investigation was warranted;
 - 33.2. I find that the fact that the conversation between Mr Mather and Mr Walmsley began when Mr Mather was stood on top of a tank has no material effect on my decision. It would have been better for the conversation to have happened in private in an office, but the fact that it didn't is not a factor that assists me to make my decision on the issues;
 - 33.3. I find that the claimant was angered by Mr Mather telling him that he doubted his account of how the HGV was damaged. It was clear from the way that the claimant delivered his oral evidence and closing submissions that he remains deeply angered by what happened;
 - 33.4. I can empathise with the shock felt by Mr Walmsley when he was told by Mr Mather that he was not convinced by the claimant's account of the incident, but his reaction – "so you don't believe me, you're saying I'm a liar" (§5 of his witness statement) was indicative a loss of temper;
 - 33.5. I have no criticism of Mr Walmsley then removing his things from his vehicle and handing in his keys because his unchallenged evidence was that he did this on the advice of a friend. I take judicial notice of the fact that many employees clear their belongings from the workplace when suspended. His act is not determinative of the issue of whether he resigned;

- 33.6. I found Mr Mather's evidence on the events of 27 October to be more credible than the claimant's;
- 33.7. I find that the claimant's evidence that he approached Mr Mather and accused him of doing the same to him as he had done to John Brennan (§5 witness statement) to be indicative of the claimant's state of mind. I find that he would not have raised the case of Mr Brennan if he was not considering his own resignation;
- 33.8. I further find that the claimant's evidence (§5) that he felt that "everything is the respondent's [i.e. Mr Mather's] view, in that it its his way or on your way" is supportive of my finding that the claimant resigned because he expressed a clear belief that he was going to be sacked, whereas he accepted that Mr Mather had given no indication that the matter was already decided;
- 33.9. I considered the claimant's text message to Mr Mather sent at 16:37pm on 27 October [73], which requested a full written explanation for his suspension. I find that given the claimant's position has been that he did not resign on 27 October, that he was unlikely to have mentioned a resignation in the text. I therefore find that there is nothing in the text that assists me to make my finding on the issue of resignation;
- 33.10. I find that it was unwise of Mr Mather to fail to respond to the text message immediately, but find that he responded by letter on the same day [63], confirming his belief that the claimant had resigned;
- 33.11. I find it unlikely that a small haulage company would happily lose an HGV driver at a time in 2021 when there was a well-publicised shortage of drivers;
- 33.12. I find the letter of 27 October 2021 [63] corroborative of the respondent's case. It was not disputed that Mr Walmsley received the letter on 20 October 2021;
- 33.13. Mr Walmsley's response to Mr Mather's letter – a letter dated 31 October 2021 [64] – rejected the assertion that he had resigned, but ended by stating that he would take advice and that Mr Mather may then achieve his aim of forcing the claimant's resignation due to breach of trust, caused by Mr Mather's insinuation that he had lied. I have looked at the claimant's words carefully. I find that he meant that Mr Mather had insinuated that Mr Walmsley had lied; that this was a breach of trust; and that the breach could lead to a resignation. That situation is exactly the same situation as had existed on 27 October: Mr Walmsley had told Mr Mather that he had been called a liar and Mr Mather's evidence was that the claimant had resigned. I find that the claimant's letter of 31 October 2021 was an attempt by the claimant to row back from his verbal resignation;

- 33.14. I would have expected Mr Mather to have responded, but do not find the fact that he did not to be supportive of the claimant's case.
34. I considered whether the claimant should have been allowed to rescind his resignation. The general position in law is that once a lawful resignation had been given (which I have found it was), it cannot be unilaterally revoked. I note that Mr Mather's letter of 27 October expressly accepted the resignation. There are two exceptions to the above principle where the resignation was retracted quickly or where the employee purports to resign in breach of contract. As Mr Walmsley's case is that he did not resign, neither route is open to him.
35. Applying my findings to the law and the issues, I find that the claimant was not dismissed. Even if he had brought this case on the basis that he **had** resigned because of the conduct of the respondent, I would have had difficulty in finding that there had been a fundamental breach of contract or a breach of the implied duty of trust and confidence by Mr Mather suspending the claimant.
36. If the claimant was not dismissed, then his dismissal cannot be unfair. If he was not dismissed, he has no right to a written statement of the reasons for dismissal. Both the claimant's claims therefore fail.

Employment Judge S A Shore
Date 19 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 20 April 2022