THE INDUSTRIAL TRIBUNALS

CASE REF: 21508/20

CLAIMANT: **Lee Candlar**

RESPONDENT: **Darren Awin, t/a Crest Upholstery**

JUDGMENT

The unanimous judgment of the tribunal is:-

(1) The claimant was not dismissed by the respondent. Accordingly his claims of notice pay and unfair dismissal are dismissed.

(2) The claimant is entitled to holiday pay in the sum of £84.38.

(3) The claimant is awarded two weeks' gross pay, in the sum of £900.00 for failure to be provided with a written statement of employment particulars contrary to Article 33 of the Employment Rights (Northern Ireland) Order 1996.

(4) The claimant's claim for failure to be provided with itemised pay statements is dismissed.

(5) The claimant's claim for unauthorised deduction from wages is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mr R McKnight**
Mr M McKeown

APPEARANCES:

The claimant was represented by Mr M Tierney, Barrister-at-Law, instructed by McNamee McDonald Solicitors.

The respondent was represented by Ms R Connolly, Solicitor of Rosemary Connolly Solicitors.

BACKGROUND

1. The respondent runs an upholstery business as a sole trader. The claimant was employed by the respondent as an upholsterer from May 1999 until May 2020 on a

full-time basis of 37.5 hours a week. He was the only full-time upholsterer of the respondent business for much of his 20 years' service, save for casual labour and latterly one other part-time member of staff.

2. The claimant claimed unfair dismissal, notice pay, holiday pay, failure to be provided with itemised payslips, failure to be provided with written statement of terms and conditions and unauthorised deduction of wages in respect of two lying weeks' pay unpaid at the commencement of his employment in May 1999.

3. At hearing the respondent accepted that the claimant was entitled to a payment for holidays taken in the sum of £84.38.

4. The respondent also accepted at hearing that the claimant had never been provided with a written statement of particulars of employment pursuant to Article 33 of The Employment Rights (Northern Ireland) Order 1996.

ISSUES

5. The following were the issues to be determined by the tribunal:-

   (1) Did the claimant resign or was he dismissed?

   There is no dispute between the parties that none of the statutory dismissal procedures had been followed. Therefore if the tribunal determines that the claimant was dismissed by the respondent this is an automatic unfair dismissal pursuant to Article 130A of The Employment Rights (Northern Ireland) Order 1996 (as amended).

   (2) Did the claimant work a period of three months' notice and was the claimant paid during this notice period?

   (3) Was the claimant provided with itemised payslips?

   (4) Did the claimant suffer an unauthorised deduction from wages in respect of *"two lying weeks at the start of his employment in May 1999"*?

SOURCES OF EVIDENCE

6. The claimant gave evidence on his own behalf at hearing. The respondent gave evidence on his own behalf. The tribunal was presented with an agreed bundle.

RELEVANT LAW

7. ***Harvey*** on ***Industrial Relations and Employment Law - Division D1 Part C specifically paragraphs 224.02 to 248*** sets out the approach to be on the issue of whether or not there was, in fact, a dismissal.

   "Perhaps the best overall approach to this (before turning to specific issues such as ambiguous language) is the test proposed by Sir John Donaldson in the early case of Martin v Glynwed Distribution Ltd (1983) IRLR 198,

   "Whatever the respective actions of the employer and employee at the time

when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?"" (224.02).

8. Where there is a dispute about whether the claimant has resigned or been dismissed, based on the authorities, the tribunal must consider:

(1) Was ambiguous language used?

(2) Was unambiguous language used which should not be taken at face value because of special circumstances?

9. The general rule is that the employer is entitled to accept unambiguous words at face value although there are exceptions to this general rule and these relate to special circumstances. In ***Sovereign House Security Services Ltd v Savage [1989] IRLR 155*** (Court of Appeal), the position was summarised as follows:

"*In my opinion, generally speaking, where unambiguous words of resignation are used by the employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view tribunals should not be astute to find otherwise. However, in some cases there may be something in the context of the exchange between the employer and the employee or in the circumstances of the employee him or herself, to entitle the tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight". (paragraph 245)*

10. ***Harvey*** notes at paragraph 225 -"*The Problem of Ambiguous or Unambiguous Language*"

"This is employment law where things are not always so simple and in practice, the situation not infrequently arises where the employer uses language which he did not intend to constitute a dismissal but which the employee interpreted as a dismissal. Similarly, the reverse can occur, ie the employee being treated by the employer as having resigned even though he had not meant to do so. Sometimes the employer merely intends to rebuke the employee, or he may use words of abuse in a moment of irritation, and yet the employee might construe them as words of dismissal. If the employee acts on the words used and leaves, this will be a dismissal if the words did indeed constitute a termination by the employer, but a resignation by the employee if they did not."

11. **IDS on Unfair Dismissal – Employment Law Handbook (September 2015 at paragraph 1.17)** summarised the legal position as follows:-

"Words that are capable of being interpreted as a resignation or dismissal may not necessarily amount to such in the circumstances. When an employer tells an employee to "get out" or "you are finished", the question arises as to whether this amounts to an express dismissal or a mere rebuke … Conversely, when an employee storms out of a meeting shouting "I am off", without stating whether this is a temporary or a permanent move, it may be unclear whether or not the employee has actually resigned.

Broadly speaking, the test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one:

- *all the surrounding circumstances (both preceding and following the incident) and the nature of the workplace in which the misunderstanding arose must be considered;*

- *if the words are still ambiguous, the tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances."*

Unfair Dismissal

12. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides insofar as is relevant to these proceedings;-

"130 (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 is either a reason falling within paragraph (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 paragraph if it –

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (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."

Automatic Unfair Dismissal

13. Article 130A of the Employment Rights (NI) 1996 Order provides:

"(1) an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if -

(a) one of the procedures set out in Part 1 of Schedule 1 to the

Employment (Northern Ireland) Order 2003 (Dismissal and Disciplinary Procedures) applies in relation to the dismissal;

(b) the procedure has not been complied with; and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with these requirements.

(2) Subject to Paragraph 1 failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

(3) For the purposes of this Article, any question as to the application of a procedure set out in Part I of Schedule 1 the Employment (Northern Ireland) Order 2003, completion of such a procedure or failure to comply with the requirements of such a procedure shall be determined by reference to regulations under Article 17 of that Order".

14. The statutory procedures require employers to follow specific procedures when subjecting employees to disciplinary action or dismissal. Failure to comply with the relevant statutory dismissal procedure impacts on compensation in relation to a claim of unfair dismissal – an adjustment upwards in the case of default by the employer or an adjustment downwards in the case of default by the employee. Articles 17(2) and 17(3) of the Employment (NI) Order 2003, provide that the tribunal must adjust any award by at least 10% and if the tribunal considers it just and equitable, in the circumstances, up to 50%. Under Article 17(4) of the 2003 Order, a tribunal can apply no adjustment (or an adjustment of less than 10%) if there are exceptional circumstances making a 10% adjustment unjust or inequitable. Any potential uplift or reduction is limited to the compensatory award only.

15. There are two alternative statutory procedures, namely:-

"(a) standard dismissal and disciplinary procedures ('DDP'); or

(b) a modified DDP."

Neither procedure had been followed in this case.

16. The EAT in ***Alexander v Bridgen [2006] IRLR 422*** set out the relationship between the statutory procedures and fair or unfair dismissal as follows:

(*1*) *if the statutory procedures were followed and there was a breach of other procedures but the individual would have been sacked anyway, that is the chance of dismissal was more than 50%, the dismissal is fair;*

(2) if the statutory procedures were followed but there was a breach of other procedures and if the chance of dismissal was below 50% the dismissal is unfair, but a ***Polkey*** *deduction can be made;*

(3) if no statutory procedures were followed there is automatic unfair dismissal and four weeks' pay is the minimum which must be paid and can be increased by 10 to 50% unless the award of four weeks' pay would result in injustice to the employer.

Statutory Right to Employment Particulars

17. Article 33 of the ***Employment Rights (Northern Ireland) Order 1996*** provides that an employer shall give to the employee a written statement of particulars of employment *"not later than two months after the beginning of the employment". **The Employment (Northern Ireland) Order 2003*** provides that an employee is entitled to a minimum of two weeks' pay and a maximum of four weeks' pay in respect of any such failure (article 27).

Right to Itemised Pay Statement

18. Article 40 of the ***Employment Rights (Northern Ireland) Order 1996*** provides that an employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

19. Articles 43 and 44 of the ***Employment Rights (Northern Ireland) Order 1996*** entitles an employee to make a reference to a tribunal for a declaration when an employer has failed to provide a pay statement. Remedy in respect of such a failure is contained within Article 44(4) as follows:

> *"Where…….. the tribunal finds that any unnotified deductions have been made from the pay of the employee during the period of thirteen weeks' immediately preceding the date of the application for the reference, the tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made."*

20. The Northern Ireland Court of Appeal in ***Julius Ember Anakaa v Firstsource Solutions Limited [2014] NICA 57*** considered the issue of electronic payslips and held as follows:

> *"We accept that in the context of current standards of information technology the requirement to provide a written itemised pay statement is complied with if words are reproduced in a visible form on a computer screen. To that however we would add this caveat – if an employer is aware that an employee is having difficulty of any sort in actually accessing a payslip in this way, the employer is obliged to find an alternative method of providing information in accordance with the statutory requirement."*

FINDINGS OF FACT AND CONCLUSIONS

21. The tribunal considered the conduct and demeanour of the claimant and the respondent at the hearing. The tribunal had concerns regarding the reliability of the claimant's evidence and where there was dispute between the claimant and respondent evidence, the tribunal preferred the respondent's evidence. The tribunal, unanimously found the respondent to be an honest and credible witness,

who gave consistent evidence and was prepared to readily accept during cross-examination when he had not complied with his obligations in respect of annual leave payments and the provision of written particulars of employment. In contrast, the tribunal found that the claimant gave contradictory evidence and was evasive during cross-examination; specific findings of which in are set out in this judgment.

22. The claimant was employed by the respondent as an upholsterer from May 1999 until the end of May 2020.

23. It is common case that on 19 February 2020 the claimant approached the respondent to request a reduction in his working hours to enable him to care for his eldest child and his father-in-law. Prior to this the claimant had agreed with his wife that he would reduce his working hours and work part-time as, in his words this was *"the most sensible"* option for their family. The central issue in this claim is a factual dispute between the parties as to what occurred during this conversation and a subsequent conversation on 20 February 2020.

24. There is no dispute between the parties that the claimant did not use the word "resign" or any other derivative of that word during the conversations on 19 February or 20 February 2020.

25. The claimant's case is that he requested a reduction in his working hours from thirty seven and a half hours (full time) to three mornings a week. He accepts that this was not agreed to by the respondent and that they reached an agreement that he would work full-time for a further three month period – on the claimant's case – to clear the next three months work. It is the claimant's case that he never resigned however he was completely vague as to what was to occur after this agreed three month period of full-time work.

In cross-examination he stated, for the first time, that he was always willing to negotiate with the respondent and was prepared to work up to five mornings a week. He accepted that this was never conveyed to the respondent.

The claimant then asserted in cross-examination, again for the first time, that he was prepared to remain employed on a full-time basis if part-time hours were not available. Again, he accepted that this was never conveyed to the respondent.

At another point in cross-examination the claimant stated:

> *"I'd offered to stay, 3, 6 or 9 months whatever he needed to get someone in place"*

The claimant's witness statement contained the following evidence:-

> *"I offered to stay full-time <u>as long as he needs</u> as I was aware of how busy work was "(Tribunal's emphasis)".*
>
> *"I explained that I was sorry that he felt that way but it was something I have to do but at the same time I am willing to work with you and I'm certainly not going to leave you in the lurch".*

26. The tribunal rejects the claimant's evidence that he was always willing to work full-time if part-time working was not available. The tribunal finds that it is not credible that the claimant would offer to stay until a replacement is found if he was always willing to continue to work full-time in the absence of an agreement to work part-time. The tribunal finds the claimant's evidence on this to be inconsistent and determines that he had never any intention of remaining employed, as in his own words he was *"willing to work with"* the respondent so as not to *"leave him in the lurch"* in terms of working his notice. It is the tribunal's finding that the conversations between the claimant and the respondent were in the context of the claimant leaving the respondent's employment otherwise why have a discussion or agreement about staying for a defined period or obtaining a replacement unless the claimant was leaving the employment.

27. The claimant's evidence in his witness statement was that he informed his childminder on 19 February 2020 that he was remaining in full-time hours for the next three months and hoped for part-time hours but had no final date. The tribunal finds it highly unlikely that the claimant would communicate to his childminder that he had only three months full time work, if he was always intending to continue to work full-time in the event that part-time hours were not available. The claimant was fully aware at this time, as accepted at hearing, that part-time hours were not available.

28. The respondent's case was that the claimant made a request for a reduction in his hours to two or three mornings a week and that he understood this to be either an eight hour week or a twelve hour week. It is common case that the request was a reduction of two thirds of his working week.

29. The respondent's case was that in the context of the conversations with the claimant on 19 and 20 February 2020 he fully understood the claimant to be resigning as the respondent was clear that a request for a two-thirds reduction in working hours could not be accommodated. The tribunal accepts the respondent's clear and consistent evidence on this. The tribunal also accepts the respondent's evidence that a three month notice period was agreed with the claimant.

30. Regardless of whether the claimant's request was for two or three mornings a week, the tribunal finds that this request was a substantial reduction in the claimant's working hours from thirty seven and a half hours to either eight hours or twelve hours a week. The tribunal is satisfied from the evidence of the claimant and the respondent that the respondent business is a small upholstery business with only one full time employee, namely the claimant and therefore could not accommodate or sustain such a substantial reduction in the working hours of its only full-time employee. The tribunal finds from both the evidence of the claimant and the respondent that the request for a reduction in hours was not something the respondent was in a position to agree to and did not in fact agree to.

31. The respondent closed his business on 24 March 2020 as instructed by the Government due to the Covid-19 pandemic. There is no dispute between the parties that the claimant worked three weeks' of the alleged three month notice period and thereafter the was placed on the "furlough scheme" – Coronavirus Job Retention Scheme.

32. In the week preceding 13 May 2020 the claimant instructed his accountant to register a limited company – *"Spring Upholstery Limited"* with the Companies Registry. The claimant was unable to confirm to the tribunal precisely the date he did this, however it is clear from the documentary evidence that the requisite forms were lodged on behalf of the claimant on 13 May 2020. Accordingly, the tribunal finds that the claimant must have instructed his accountant at least 5-7 days prior to this date. The claimant's evidence was that he had been operating a small scale upholstery business called 'Glenview Upholstery' during the period of his employment with the respondent and undertaking small jobs for family and friends. The claimant asserts that the decision to create a limited company was a name change *"and nothing more"*. The claimant asserts that the decision to change the legal status of his upholstery business was on advice and *"to keep me protected".* The tribunal does not accept that this change was "*just a name change"*. The tribunal is satisfied from all the evidence that the claimant was preparing to upscale his upholstery business in preparation for the termination of his employment and in the full knowledge that his employment was coming to an end.

33. The tribunal concludes that the claimant's actions in setting up a limited company entirely contradict his assertion that he did not resign and would have continued to work full-time if part-time hours had not been agreed with the respondent. His conduct supports the respondent's case that the claimant resigned and was working an agreed three month notice period.

34. There is no dispute that the respondent sent the claimant a text message on 15 May 2020 to confirm that the business was re-opening on 25 May 2020 and that the furlough scheme was ending on Friday 22 May 2020.

35. On 24 May 2020 the claimant responded to this text *"are you still set to open tomorrow?"* The respondent responded *"yeah"* and the claimant respondent *"the kids aren't at school yet so I can't get into work still. What are my options here?"* The respondent responded as follows on 24 May 2020 [at 16.33]:

> *"we had agreed that you leave at the end of May any way so if you can't make it now, are you happy enough to call it a day now then?"*

36. The claimant responded [at 17.10]:-

> *"We never agreed that I was leaving at all and I have never said I was leaving …".*

The respondent replied stating [at 18.23]:-

> *"Sorry I'm mistaken. You said you wanted to be at home with Jack as you and Shannon were concerned about him and you both thought it would be better if you got him into a routine. So you both decided you would cut your hours to two or three mornings a week, you said preferable two as you can also take Ray to his appointments so Shannon could get sleeping if she coming off a shift. I told you that wouldn't really suit I need sometime full-time and I asked you to work until the end of May and you kindly agreed to give me chance to put other measures into operation. I have put all the required measures in place for us to return tomorrow as I let you know last week. I am flexible if you can only do two mornings this week to try to*

accommodate you with the boys. If you can let me know what mornings suit I would appreciate it."

37. The claimant asserted that the reason he did not respond to the text message sent at 18.23 on 24 May 2020 (as set out above) was because it was inaccurate. The tribunal does not accept this and finds the claimant's evidence to lack credibility. It contradicts entirely the claimant's conduct earlier that day when he disagreed with the previous text message and responded with "*we never agreed that I was leaving at all."* Furthermore the tribunal finds that if the claimant, as he asserted in cross-examination, was always prepared to work full-time hours as part-time hours were not available, this was his opportunity to convey this to his employer.

38. It is common case that the claimant did not report for work on 25 May 2020. However he attended the respondent's workplace on Tuesday 26 May 2020.

39. The tribunal, on balance accepts the respondent's evidence as to what was said on the 26 May 2020. The claimant asserts that his purpose in attending the office on 26 May 2020 was to *"discuss the situations and find out what was happening"*. The claimant claims this conversation lasted two hours, the tribunal rejects this and accepts the respondent's unchallenged evidence that the conversation took no more than 10 minutes as the claimant had his children in the car. The tribunal also accepts the respondent's evidence that the conversation related only to the fact that the respondent could not accept a 29 hour reduction in the claimant's working week and that the claimant had been working his three months' notice. There is no dispute that the claimant became angry and stormed out.

40. The tribunal concludes from the claimant's evidence that he had no intention of returning to work - his children were at home and he was not prepared to avail of childcare/school for key worker staff. (The claimant's wife is a key worker.) The tribunal concludes that the claimant was not going to return to work for the respondent. It is the tribunal's view that if the claimant genuinely understood (as he was asserting as the hearing) that his employment was continuing he would have confirmed this and the fact that he was willing to work full time hours given that part time hours were not available. The claimant did not do so either at the meeting or prior to the meeting via text message.

41. The burden of proof rests with the claimant to prove on the balance of probabilities that he was dismissed. The tribunal unanimously concludes from all the evidence, that the claimant was not dismissed by the respondent and that he resigned based on the following:

    (1) The claimant had agreed with his wife that he would work part-time as the best option for their family.

    (2) The tribunal rejects the claimant's evidence that he was always prepared to work full-time as suggested at hearing, this is contrary to the evidence contained in his witness statement and flies in the face of the claimant's conduct as per the tribunal's findings set above. The tribunal is satisfied that the claimant was only ever prepared to work part-time hours and that he fully understood the respondent could not accommodate part-time hours and therefore he resigned.

(3) There was no dispute between the parties that the respondent had never agreed to part-time working or to the claimant reducing his hours in any respect.

(4) The tribunal accepts the respondent's clear and consistent evidence that he understood from the context of his conversations with the claimant on 19 and 20 February 2020 that he was only prepared to work part-time and that as this could not be accommodated, the claimant was resigning.

(5) The tribunal accepts the respondent's evidence that he and the claimant agreed a three month notice period. This is what the claimant indicted to his childminder after the conversation on 19 February 2020 and this is as a matter of fact, his entitlement due to this years of service.

(6) The tribunal is satisfied from the evidence that the claimant was setting up his own business in the full knowledge that his employment with the respondent was ending.

(7) The claimant had no intention of returning to work either on a full or part-time basis after May 2020. He was not prepared to avail of childcare or school facilities open to key workers; and it was clear to the tribunal that the claimant was not available to work until schools and childcare opened in September/October 2020.

42. It is regrettable that the respondent did not communicate in writing with the claimant in February 2020 to confirm his agreed termination date and/or set out what had been agreed between them. The tribunal recognises that the respondent is a sole trader operating on a small scale, however this should not prevent him from carrying out what is considered normal industrial practice for an employer. The respondent can properly be criticised for failing to do this and for his failure to comply with his legal obligation to provide a written statement of employment particulars.

43. There was no dispute that at the start of his employment, the claimant was initially paid in cash with details of the normal statutory deductions handwritten on the envelope. The respondent changed its method of payment in and around 2006 using an online BACS system resulting in the claimant's wages being paid directly into his bank account. The tribunal accepts the respondent's evidence that the claimant was advised that his payslips could be printed each month and that the claimant stated that he did not require them. The claimant confirmed in response to a question from the tribunal that he never requested any payslips from the respondent at any time. The tribunal determines that had he done so these would have been provided as copies were contained in the trial bundle.

44. In light of the tribunal's findings of fact as set out above, the tribunal determines that the claimant resigned and was not dismissed by the respondent. The tribunal concludes from all the evidence and the surrounding circumstances that the claimant and the respondent agreed a notice period of three months' full time

working. The claimant worked this notice albeit partially under the Coronavirus Job Retention Scheme. The tribunal therefore determines that the claimant is not entitled to any notice pay.

45. There was no evidence before the tribunal that the claimant worked two weeks' lying week in May 1999. The onus is on the claimant to prove he has suffered unauthorised deduction of wages and the claimant has not discharged that burden of proof on the balance of probabilities.

46. The tribunal finds, as accepted by the respondent at hearing, that the claimant was not provided with a written statement of terms and conditions of employment pursuant to Article 33 of the Employment Rights (Northern Ireland) Order 1996. The claimant is therefore awarded two weeks' gross pay as compensation. The claimant's gross weekly pay as confirmed in the respondent's response to the tribunal is £450.00.

47. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 19 July 2021, Belfast.

This judgment was entered in the register and issued to the parties on: