



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103852/2023

5

Held in Glasgow on 11 and 12 December 2023

Employment Judge P O'Donnell

10 **Mr B Cullen**

**Claimant
Represented by:
Mr I Burke -
Solicitor**

15 **Brian Cullen Ltd**

**Respondent
Represented by:
Ms Kennedy-
Curnow – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the claim for unfair dismissal is not well-founded and is, hereby, dismissed.

REASONS

Introduction

1. The claimant has brought a complaint of unfair dismissal which is resisted by
25 the respondent.

Evidence

2. The Tribunal heard evidence from the following witnesses:-
a. The Claimant.
b. Sarah Cullen (SC) – the claimant's wife.
30 c. Stuart Thompson (ST) – a director of the respondent's corporate shareholder.

d. Maxine Johnstone (MJ) – the respondent’s group operations director.

3. There was an agreed bundle of documents prepared by the parties. A reference to a page number below is a reference to a page in the agreed bundle.

5 4. In terms of the process leading to the claimant’s dismissal, there is not a significant dispute of fact in terms of the correspondence sent, the meetings held and what was said at such meetings. The main dispute of fact related to events in 2011 and 2012 when the claimant entered into a joint venture agreement and the Tribunal will address that further below in its decision.

10 Findings in fact

5. The Tribunal made the following relevant findings in fact.

6. The claimant is a dentist and bought the practice which forms the business of the respondent in 2004. At the time, he was in partnership with a fellow dentist. The business was subsequently incorporated as the present
15 respondent and the partner was no longer involved in the business.

7. In 2011, the respondent was in financial difficulty. The claimant was introduced to potential investors by his bank. These were ST and another gentlemen named Jamie Newlands. They ran a company known, at the time, as HMS (896) Ltd. This company subsequently changed its name to Brite
20 Holdings (Scotland) Ltd and it will be referred to as BHSL in this judgment. BHSL was interested in investing in dental practices and related businesses.

8. ST became involved in the running of the respondent to assist in turning it around; he and BHSL took on a number of administrative and management tasks such as dealing with creditors, banks and suppliers as well as taking on
25 HR and payroll functions. This freed up the claimant to focus on the actual work of the business in providing dental services to patients.

9. After some discussions, the claimant and his wife entered into a formal joint venture agreement (JVA) with BHSL. A copy of the JVA is at pp57-84 and the relevant terms are as follows:

- a. The claimant and his wife each held 1 “A share” in the respondent which entitled them to dividends from the business. These shares had no voting rights.
 - b. BHSL held 2 “B shares” in the respondent. These shares did have voting rights including control over whether dividends were made.
 - c. The JVA sets out circumstances in which there is an obligatory transfer of shares from the claimant or his wife to BHSL. The value of the shares will depend on whether the claimant or his wife are classed as a “good” or a “bad” leaver; if the former then BHSL will purchase the shares at “fair value” as defined in the JVA; if the latter then the price is £1.
 - d. The circumstances in which the claimant or his wife are classed as good or bad leavers are set out in the schedules to the JVA. For example, retirement by the claimant at normal retirement age is a “good leaver” event whereas the claimant ceasing to be employed by the business in other circumstances is a “bad leaver” event.
10. The JVA was signed by the parties over a period of 8 days in March 2012. The working relationship then continued without any serious issues arising until November 2020.
 11. In November 2020, Laura McMillan (LMcM), the practice manager at the respondent, raised a number of issues with MJ which LMcM had with how the claimant was conducting himself. MJ spoke to ST who agreed that he would speak to the claimant.
 12. The issues raised by LMcM fell within a number of different categories; some related to how the claimant behaved towards LMcM such as excluding her from certain tasks by setting up a Whatsapp group for staff which she was not invited to join; others related to business matters such as the claimant’s personal expenses being paid from company accounts; some were complaints made by other staff about difficulties in communication with the claimant, specifically, that he would not respond to emails.

13. The claimant did not deny or dispute any of the issues discussed with him by ST. LMcM resigned from the business in February or March 2021 (witnesses could not recall the exact date) and one of the reasons given for her departure was the issues in her working relationship with the claimant.
- 5 14. On 19 February 2021, the claimant emailed ST (p165) indicating that all further communication regarding the business should be made via a solicitor whom he had appointed to act for him. There had been no prior discussion about this. ST replied by email of 21 February 2021 (p165) stating that this is not usual practice. A letter dated 22 February 2021 (p166) was then
10 received from the solicitor in question asking for “*all pertinent documentation*” that affects the claimant.
15. ST sent a letter to the claimant dated 6 March 2021 (p112-115) setting out the various issues discussed at their meeting in November 2020 and what actions were being taken in respect of those. The claimant made no direct response
15 to this letter; he sent a handwritten letter dated 7 March 2021 (p116) again stating that all communications should be sent via his solicitor.
16. During this time, MJ had acted as the practice manager for the respondent whilst a permanent replacement for LMcM was recruited. She had identified five patients for whom the claimant had done work out of hours at the practice
20 but for whom no payment had been received. The total value of the work done was over £24,000.
17. By letter dated 19 March 2021(pp177-179), the respondent wrote to the claimant’s solicitor asking for the claimant to provide an undertaking relating to the various issues that they had identified including providing treatment
25 when the patient was not meeting the cost of that treatment, not using company funds to pay for personal items and not altering the targets for any employees.
18. No substantive response was received to this and the respondent subsequently sought and obtained an interim interdict from the Court of
30 Session against the claimant in respect of the issues identified by them. This was in April 2021.

19. On 29 May 2021 (pp180-183), MJ (who was still acting as the practice manager) emailed the board members (that is, the claimant, ST and another dental practitioner) setting out a number of issues which she had identified in the running of the practice with which she had concern. She set out changes she was proposing to make to remedy these and bring the running of the practice in line with other practices within the group.
20. Examples of the issues identified were the claimant asking nursing staff to write prescriptions, the practice manager sending claims to the NHS for payment when it should be done by clinicians, ensuring there were clear consents from patients for treatment and improvements in communication.
21. There was no substantive response to this email from the claimant.
22. MJ wrote to the claimant by letter dated 15 July 2021 (pp185-186) regarding the various issues that had been raised by LMCM. The letter explained that she had concluded that the claimant's behaviour and communications had fallen below the standards expected of him but that no formal action would be taken in relation to this.
23. Over this period, it continued to be the case that the claimant sought to communicate via his solicitors.
24. In or around September 2022, issues were raised about the claimant's conduct by the acting practice manager, Robyn Gardener. These were raised with her by nursing staff within the practice who had indicated that they did not want to continue in the business if matters did not change.
25. These issues were drawn to ST's attention who decided to instruct an independent investigator, Peninsula, to carry out an investigation.
26. A meeting was arranged between the claimant and the investigator to be held on 9 September 2022. The claimant attended the meeting but declined to participate in the meeting on the basis that the invitation letter did not set out the issues to be investigated and that his solicitor was not present.

27. The investigator spoke to other employees and produced a report (pp129-151) which recommended that the claimant be invited to a disciplinary hearing to answer the various concerns raised by staff. These included issues around time keeping, time management, a disregard for the respondent's appointment systems, derogatory comments about BHSL and photographing documents containing patient data.
28. In the event, no disciplinary action relating to these issues was ever held.
29. On 14 September 2022, the claimant emailed ST directly (p156) stating that the business relationship they were in bore no resemblance to what had been agreed in 2012. The claimant stated that ST had compiled a list of complaints about the claimant and that he had a similarly long list of complaints about ST. He goes on to say that he was foolish to invite ST into his business and that he now wished ST to go. He asks how much it will take for ST to leave.
30. ST considered that this email should be treated as a grievance and Peninsula was again instructed to investigate this (albeit by a different person). A meeting was organised for 22 September 2022 but, again, the claimant declined to participate. The report from Peninsula recommended that any grievance should not be upheld.
31. By this point, there was a concern within the respondent that the working relationship with the claimant had broken down, in particular between the claimant and ST. Peninsula were again instructed to conduct a formal hearing regarding this issue. The claimant was invited to a meeting to take place on 14 October 2022 but this did not take place as there was an attempt at mediation instead. The mediation was not successful and the formal hearing was reconvened for 24 November 2022.
32. The claimant attended this meeting and was given the opportunity to provide further written submissions. The investigator sought further information from the respondent and held a further meeting with the claimant on 5 January 2023. A further opportunity was given for the claimant to provide written submissions.

33. The investigator produced a report (pp260-304) dated 31 January 2023. The report concluded that there had been a breakdown in the relationship between the claimant and ST. A suggestion was made that arbitration could be tried but that if this was not considered appropriate then it was recommended that the claimant be dismissed with pay in lieu of notice.
34. The report was passed to MJ to make the final decision. She reviewed the report and the various appendices containing the statements from the claimant and others. She concluded that the working relationship had irretrievably broken down and was of the view that there was no understanding from the claimant about how he had contributed to this. Further, she was of the view that there was nothing suggested by the claimant as to how the relationship could be fixed other than ST or BHSL being bought out.
35. MJ considered whether there were any alternatives but did not consider that arbitration would succeed where mediation had not been successful. Neither did she consider that a formal warning would remedy anything because things were too far gone. The option of redeployment or a reorganisation was ruled out because the claimant would still have to work with ST.
36. MJ concluded that dismissal was the appropriate sanction and this was confirmed to the claimant by letter dated 1 March 2023 (p305). The letter offered the claimant a right of appeal but he did not exercise this.

Submissions

37. The submissions made on behalf of both parties were focussed on the facts of the case and what conclusions the Tribunal should draw from those facts in relation to the reason for dismissal. The Tribunal will address those matters in more detail below and so, for the sake of brevity, the Tribunal does not intend to repeat that detail here but has noted what was said on behalf of both parties.

Relevant Law

38. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).
39. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is “some other substantial reason” (SOSR).
40. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.
41. The SOSR category is a broad category and so long as the reason relied on by a respondent is not whimsical or capricious and is capable of justifying the dismissal then it can be considered a substantial reason (*Harper v National Coal Board* [1980] IRLR 260, *Kent County Council v Gilham* [1985] IRLR 18, CA)
42. A loss of trust and confidence or a breakdown in the working relationship can fall within the SOSR category but there needs to be conduct on the part of the employee which causes the loss of trust in question and care must be taken to avoid this reason being used as a way to avoid the effort that may be required to dismiss for other reasons such as conduct.
43. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 has long been authority for the proposition that a dismissal can be unfair on the grounds of procedural failings. Procedure can include giving an employee the opportunity to explain their actions or provide some form of mitigation to seek to avoid dismissal.
44. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment (“ACAS Code”) in assessing the procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

45. On the question of whether any procedure was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the investigation.
- 5 46. If the Tribunal is satisfied that there is a potentially fair reason for dismissal then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable
10 band of options available to the employer.

Decision

47. The Tribunal will start its decision by making it clear what it is not determining in this case. Much evidence was led by both sides about the events giving rise to the signing of the JVA by the claimant, his wife and BHSL. However,
15 the Tribunal is not concerned with the rights or wrongs of the agreement that was reached, whether the JVA was enforceable or whether it should be reduced. The Tribunal is dealing with the question of whether the claimant was unfairly dismissed.
48. The reason why the Tribunal has made this point is that the circumstances in
20 which the JVA came to be signed and its terms are clearly an issue for the claimant. It needs to be made clear that the Tribunal is only looking at these matters in the context of the unfair dismissal claim and only to the extent that these issues are relevant to the determination of the unfair dismissal claim.
49. The relevance of these issues arises from the claimant's contention that the
25 reason given for his dismissal by the respondent (that is, the breakdown in the relationship between the claimant and ST) is not the true reason for his dismissal and, rather, he was dismissed in order that BHSL (or, in reality, ST) could obtain all the shares in the respondent and that this had been ST's intention all along.

50. Indeed, as was submitted by Mr Burke on behalf of the claimant, this argument is the sole basis on which the claimant says his dismissal was unfair.

51. The Tribunal, therefore, turns to the question of what was the reason for dismissal and whether it was a potentially fair reason. The Tribunal reminds itself that the burden of proof in showing the reason for dismissal lies on the respondent but where the claimant is challenging that by advancing an alternative reason then the Tribunal has to assess all the evidence to determine, on the balance of probabilities, which reason is true.

52. In carrying out that assessment, the Tribunal has taken account of the following matters:

a. If the claimant's dismissal was the culmination of a plan by ST which starts with the signing of the JVA then he has waited a considerable time (almost a decade) to put this into action. There was no evidence of any issues in the working relationship between ST and the claimant from March 2012 when the JVA was signed until late 2020. In particular, the claimant led no evidence about anything done during this period by ST which was intended to force the claimant out of the business.

b. Further and related to this first point, there was no evidence why ST would decide to start trying to force the claimant out of the business in 2020. If that was his intention then there was no evidence to suggest why, out of the blue and apropos of nothing, ST would do this in 2020. As the Tribunal will address in more detail below, the more plausible version of events is that ST had concerns brought to him by other employees about the claimant and when he discussed these with the claimant matters snowballed into a breakdown in the relationship.

c. If the terms of the JVA were part of a plan to dupe the claimant out of his business then it is rather extraordinary that ST would effectively put that plan in writing by way of the terms of the JVA. The terms of that agreement are plain (albeit couched in the language of lawyers) in

relation to the rights of the different class of shareholders and what happens to any shares if a shareholder was a “good” or a “bad” leaver. All it would have taken for ST’s alleged plan to be derailed at the very outset would have been for the claimant or his wife to have read the agreement or sought legal advice (as the claimant did in 2020) and it would have been obvious to them that the JVA did not set out the deal that they say they thought had been agreed in 2012.

5

d. One particular and fundamental hole in the claimant’s case theory is that the terms of the JVA class him as a “bad leaver” if he is dismissed with no mention of whether that dismissal was fair or lawful. In other words, if ST was seeking to force the claimant out and gain all the shares in the respondent, he could have dismissed the claimant at any time for any reason in order to achieve this goal. There was no need to go through the lengthy and time-consuming process which was carried out.

10

15

e. The evidence before the Tribunal was that all of the issues raised with the claimant had come from other staff (predominantly the various practice managers, either their own issues or issues staff raised with them, although some issues had been raised by MJ) and there was no evidence whatsoever that ST had instigated, prompted or encouraged staff to raise these issues.

20

f. The type of issues being brought to the attention of management (for example, the payment of personal expenses from company accounts, doing work out of hours on company premises with company equipment for which no payment is received by the business and certain behaviours towards staff) are all matters which, in the Tribunal’s experience, would be raised with an employee. Indeed, the Tribunal would be surprised if an employer did not seek to look into and resolve such matters given their nature.

25

g. It is notable that the claimant did not, at any time during the process leading to his dismissal, seek to dispute the various issues being

30

5 raised with him about his conduct and behaviour. The claimant made no suggestion at any time that the issues raised were a sham or smokescreen for any alternative motive of ST. The claimant did, for the first time, seek to offer some explanation for certain matters during the Tribunal hearing but that is too late.

10 h. Indeed, the claimant did not reply to much, if any, of the correspondence sent to him by the respondents about his behaviour. In his evidence, the claimant sought to suggest that the correspondence did not require or ask for a response but the Tribunal considers that this does not reflect well on the claimant. Putting aside the fact that certain matters (for example, the request for an undertaking) clearly required a response, the Tribunal considers that any reasonable employee faced with what they consider to be an attempt to force them out of their business would have sought to counter anything which they considered to be untrue, exaggerated or
15 which they otherwise disputed.

20 i. The claimant was given multiple opportunities to respond to matters by way of the various investigations by Peninsula (including one which was specifically organised to give him an opportunity to air any grievances) but he chose not to engage with these until the very last of them when the potential for dismissal was on the cards.

25 j. It was the claimant who escalated the difficulties in communications by requiring any communication to be done via his solicitor. It is highly unusual for an employer and employee to communicate via a lawyer given the potential impact on day-to-day communications required to run a business. The Tribunal considers that this shows, at a very early stage, that there was a serious breakdown in the relationship on the claimant's part.

30 k. On the other hand, it is also highly unusual for an employer to seek an interdict in relation to an existing employee and this could be said to show a serious breakdown in the relationship on the respondent's part.

However, this has to be viewed in the context that the respondent had not immediately jumped to legal action and had sought to resolve matters with the claimant by less formal means first.

5 i. Looking at the respondent's actions in contrast to those of the claimant, they continued to try to maintain the relationship by means of discussion, mediation and a grievance process. However, all of these were stymied by the actions of the claimant. The Tribunal does note that there is a suggestion that the mediation did not proceed because the mediator did not think there was any mileage in this but, 10 from the respondent's perspective, the mediation ended after the mediator spoke to the claimant and told them that he did not want to proceed with it.

15 m. It was put to ST in cross-examination that he could have dismissed the claimant at an earlier stage and he accepted that this was correct. The Tribunal agrees that there were early stages in the process when it would not have been surprising if some form of disciplinary action (up to and including dismissal) had been taken by the respondent. However, this does not assist the claimant's case theory as it evidences an employer showing restraint and seeking to retain the 20 employee by resolving their differences.

25 n. The claimant sought to rely on the experience of other people who entered into a JVA with BHSL who either resigned from the business or were dismissed as evidence of a pattern of conduct by BHSL and ST. However, the respondents led evidence that the resignation was solely the decision of the person in question and the dismissals arose from issues of misconduct. The Tribunal heard no evidence of the details of these other instances which would allow it to draw any adverse inferences.

30 53. Taking account of all of these matters, the Tribunal considers that the claimant's case theory is inherently implausible given the length of time he says ST had been planning this, the fact that it could have been done with

ease at any time, the lack of any evidence (or, indeed, the absence of any assertion by the claimant) that the issues being raised about his conduct were false or encouraged by ST and the conduct of the claimant himself in being the one who almost wholly ceased communicating with the respondent.

5 54. On the balance of probabilities, the far more plausible scenario is that the respondent had issues raised with them by other employees about the claimant which they sought to investigate and resolve. The claimant's reaction to this (for example, breaking off direct communication and not engaging in internal processes) led to a conclusion that there had been an
10 irretrievable breakdown in the relationship between the claimant and ST.

55. In these circumstances, the Tribunal finds that this was the genuine reason for the claimant's dismissal.

56. The next question for the Tribunal is whether this reason is some other substantial reason sufficient to justify the claimant's dismissal.

15 57. There was no real argument advanced on behalf of the claimant that the decision-maker (MJ) had reached an unreasonable conclusion that there had been an irretrievable breakdown. The claimant's case was focussed on this not being the reason at all.

20 58. The claimant's position on whether there was or was not a breakdown in the relationship with ST was somewhat confused. He sought to say that he did not think that there was whilst, at the relevant time, he was sending an email to ST saying that he wanted ST out of the business. The claimant, when this was put to him in cross-examination, sought to say that it was an attempt to open up "fair, open and honest discussions" (a phrase he used repeatedly in
25 evidence) but the Tribunal does not consider this to be credible; the terms of the email in question are not in any way conciliatory or indicative of a desire for a resolution other than the departure of ST.

30 59. In any event, the Tribunal considers that an employer who is faced with a senior employee who is refusing to communicate directly with a fellow board member and who has issued correspondence saying in clear and

unambiguous terms that he wants that person out of the business can reasonably conclude that the relationship between those individuals has irretrievably broken down.

5 60. The Tribunal notes that ST, although not the claimant's employer as a matter of law, is, for all practical purposes, the person for whom the claimant has to work. ST is the most senior person in BHSL which is the controlling corporate shareholder in the business in which the claimant worked. ST represented BHSL on the board of the respondent. If the working relationship between them had irretrievably broken down then this is clearly a substantial reason
10 for dismissal and is something which is capable of justifying the claimant's dismissal.

61. The Tribunal, therefore, finds that there was a potentially fair reason for dismissal.

15 62. Although the claimant has not advanced any other argument regarding the fairness of his dismissal, the Tribunal will deal with the issues of procedure and the band of reasonable responses.

20 63. In terms of procedure, the claimant was invited to attend a meeting to discuss the issue of the alleged breakdown in his relationship with ST, it was made clear that this process could result in his dismissal and he was offered the right to appeal. The Tribunal can identify no error in the procedure leading to the claimant's dismissal and, indeed, none was advanced by the claimant.

25 64. As for the band of reasonable responses, the Tribunal reminds itself that it is not for it to substitute its own decision for that of the employer. As has been addressed above, the respondent found itself in a situation where one senior employee was seeking to have a fellow board member (representing the major shareholder) removed from the business and previous efforts to resolve the situation had not been successful. It is very difficult to see how dismissal could not be within the band of reasonable responses in such circumstances and, again, the claimant did not seek to argue this.

65. For all these reasons, the Tribunal considers that the claim for unfair dismissal is not well-founded and is hereby dismissed.

5

Employment Judge O'Donnell
Employment Judge

10

20 December 2023
Date

Date sent to parties

22 December 2023