Case Number: 3300054/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Hamilton	v	Solomon and Wu Limited

Heard at: Watford **On**: 13 and 14 November 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person

For the Respondent: Mr B Henley, Representative

RESERVED JUDGMENT

The claimant was not dismissed unfairly in breach of section 103A of the Employment Rights Act 1996. Nor was the claimant dismissed unfairly in breach of section 100 of that Act.

REASONS

Introduction; the claim

1 The claimant's claims originally included a claim of age discrimination as well as that he had been unfairly dismissed in breach of section 100 and/or section 103A of the Employment Rights Act 1996 ("ERA 1996") by the respondent. The claimant has not claimed "ordinary" unfair dismissal, as he was continuously employed by the respondent for less than 2 years. The age discrimination claim was withdrawn, and the hearing of 13 and 14 November 2017 concerned only the claim of unfair dismissal. The claimant's case in

relation to statements made was based on statements that he made to other employees of the respondent.

The issues

2 Accordingly, I had to decide whether the reason, or, if not the reason, the principal reason, for the claimant's dismissal was that he had

2.1 disclosed to (in the circumstances) the respondent information that the claimant reasonably believed tended to show "that the health or safety of any individual has been, is being or is likely to be endangered" (those words are in section 43B(1)(d) of the ERA 1996);

2.2 brought to the respondent's "attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety" (those words are in section 100(1)(c) of the ERA 1996); or

2.3 "in circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work" (those words are in section 100(1)(d) of the ERA 1996).

3 Only if the claimant satisfied me that the principal reason for his dismissal was one of the three circumstances set out in paragraph 2 above could his claim of unfair dismissal succeed.

The evidence

4 I heard oral evidence from the claimant on his own behalf and on behalf of the respondent from (1) Mr Robin Thompson, and (2) Mr Jake Solomon, who is a director of the respondent. I was referred to and read documents in a joint bundle of documents. I was also referred to, and read, a signed witness statement made by Mr R Hart on 7 July 2017 and an email written by Mr Stuart Pearson on 7 August 2017, which the claimant relied on. The respondent put before me, and I read, a signed witness statement of Ms Paula Groves dated 9 August 2017, and a signed witness statement of Mr Daniel Deether (who said in that statement that he was the respondent's "Health & Safety officer") dated 9 August 2017. Having done so, I made the following findings of fact.

The facts

(1) The sequence of relevant events

5 The respondent's business is that of a materials supplier to the construction industry. The business is innovative in its use of hypoxy resin, metal powder, and other materials with for example MDF or plywood boards. It is a relatively small business, with, at the time of the claimant's employment in it, 15 employees.

6 The claimant is a joiner by trade. He first worked for the respondent via an agency, as a worker supplied by an agency. That was for a period of three months. During that period, his conduct and performance were satisfactory. After he became an employee of the respondent, he became a rather less satisfactory worker as far as both Mr Thompson and (more importantly) Mr Solomon were concerned.

7 The claimant was employed in both the respondent's workshop and, occasionally, on site, installing the products which the respondent had made. The claimant was line managed by Ms Paula Groves whose job title then was "Head of Resin Panel Production". She reported to Mr Solomon. The work that the claimant did in the workshop was sanding and polishing, plus some cutting, of resin panels.

8 Mr Solomon's evidence (which in this regard was not challenged) included that on 29 September 2016, the claimant walked out of work without permission because he had become frustrated with Ms Groves' management of him. Mr Solomon had followed him down the street, caught up with him, discussed his feelings about the matter, and told him that he would have to find a way to deal with his feelings differently. Mr Solomon at that time warned the claimant that he would not be permitted to act in the same way again.

9 On Friday 18 November 2016, the respondent's Operations Manager, Mr Henry Currer, gave employees a questionnaire to complete stating what were their three biggest frustrations about working for the respondent, and that they regarded as the three best things about working for the respondent. The claimant did not complete that questionnaire because, he said in oral evidence, although it was anonymous, it would be left lying around and he preferred to raise his concerns in person. Mr Solomon was away during that week.

10 On the following Monday, 21 November 2017, Mr Solomon gave the claimant a task to do with Ms Groves. The work which the claimant was doing at that time was sanding some resin panels, using a new belt sander, called a Wadkins sander. Ms Groves had caused the respondent to buy that sander, and she was collecting data about its use. The claimant was doing that work under Ms Groves' instruction. He felt that he was doing her job, and he was frustrated by the manner in which she was managing him.

11 The claimant then went to see Mr Solomon and complained about the fact that Mr Solomon was continuing to require him to work with Ms Groves

despite the fact that he (the claimant) had told Mr Solomon about his concerns about being managed by Ms Groves. In addition, the claimant said that he was concerned about the level of dust which was in the workplace.

12 Mr Solomon told the claimant to continue doing what he was doing with Ms Groves and that he (Mr Solomon) would speak to Ms Groves.

13 Mr Solomon then went and got together with Ms Groves and Mr Currer, and then asked the claimant to join all three of them in Mr Solomon's office. Mr Solomon asked Mr Currer to join them because Mr Currer had worked with Ms Groves to create the production schedule which she had then implemented. Mr Solomon's evidence (which I accepted) was that he hoped that between them, he, Ms Groves and Mr Currer "could make it clear to [the claimant] how the company worked and how he had to work within the company".

14 When the claimant came into the room, he asked to have a solicitor present. Mr Solomon did not know why the claimant wanted a solicitor to be present, and refused the request. Mr Solomon's evidence about what the claimant raised as concerns during that meeting tallied with that of the claimant in broad terms. Mr Solomon said that the claimant "became increasingly agitated during this meeting and refused to listen to what we were trying to explain, at times even saying that he did not believe that Paula was his manager."

15 The claimant then referred to an event several months previously when Mr Solomon had patted him on the back, when saying something like "Are you OK?", saying that that was an assault. Mr Solomon asked him why he had not reported it to the police as an assault at the time if he genuinely thought that it was an assault, and had instead waited until that day to raise it. The claimant gave no answer to that question.

16 The claimant then said that he and one other employee had suffered an injury at work because of the saw blades that they had been required by the respondent to use. In relation to himself, the claimant asserted that he had been required to use the wrong saw blade on the table saw, so that when he was cutting a piece of wood it had "shot out at [him] and trapped [his] finger in [a part] of the machine". However, the claimant had not had any time off work with sickness or because of an injury, and he had not reported to Mr Deether (who, Mr Solomon confirmed, was the respondent's health and safety officer) or any other member of staff that he had had a workplace injury. (This was the respondent's evidence, and it was not contradicted by the claimant.)

17 The claimant then also asserted that (1) the workshop's fire exit was blocked by the respondent's fork lift truck, (2) there were canisters of adhesive contact glue left beneath the workshop's heating elements and that that was a fire risk, (3) the fact that the respondent did not have its tools tested regularly for electrical safety (commonly called "PAT testing") was a breach of health and

safety regulations, and (4) the respondent's dust extraction mechanisms were insufficient.

18 The claimant also complained about the use of some "Stork" conduits which came down from overhead and contained power sockets for use with portable power tools, and a socket for a flexible dust extraction hose to go into. He asserted that the fact that power cords had to be plugged into the sockets overhead rather than on the ground, for example, had led to an accident in which a colleague had had a polisher stripping his clothing off him and burning his leg.

19 The claimant claimed also that he had received a small electric shock when using one of the respondent's portable power tools. In oral evidence, he claimed that it was because the socket on the Stork conduit he was using was faulty. Mr Solomon said that the claimant had not raised with him the alleged electric shock. The claimant said that he did so on 21 November 2016. I return to this conflict of evidence below.

20 The claimant said during the meeting that he would be taking his concerns further, but he did not say that he would do so by going to the Health and Safety Executive ("HSE").

21 Mr Solomon was of the view that the claimant was angry at Ms Groves and that his (the claimant's) problem was an inability to take instructions from the respondent's management. The claimant was at that time on probation, and there was a pre-arranged review of the claimant's probation due to take place on 25 November 2016. Mr Solomon was of the view that the claimant realised during the meeting of 21 November 2016 that his (the claimant's) conduct had become unreasonable and that there was a good chance that his contract would be ended on 25 November.

22 Mr Solomon decided, however, to give the claimant one final chance, so he did not dismiss him on that day, 21 November. The claimant was, however, due on the following day to be out of the workshop and installing some of the respondent's products in London. Mr Solomon believed that the claimant was now in danger of being incapable of following instructions from any manager of the respondent, so he decided that the claimant should not go to the site on the following day but should instead work in the workshop.

23 The claimant then went home, as it was nearing the end of the working day. On the next day, 22 November 2016, he went to work, but when he was told by Mr Solomon that he was to be sanding panels that day, he said that he would not do that because it was unsafe because of the amount of dust that was in the atmosphere when he did it. Mr Solomon then dismissed the claimant for refusing to do what he was being required to do.

24 The claimant subsequently made a complaint to the HSE. One of Her Majesty's Inspectors of Health and Safety, Mr Nigel Fitzhugh, wrote to the claimant on 16 February 2017 in the following terms:

> "Dear Sir
> Thank you for raining [sic] the concerns that you have with HSE. We rely on members of the public to bring to our attention such matters so that appropriate action can be taken. On this occasion I found a little evidence of the matters you specifically raised. Had they been isolated matters they would have been dealt with by way of verbal advice. However I was concerned with some other matters which, although you did not specifically raise them as a concern, have led to limited enforcement action."

25 That "limited enforcement action" consisted of an Improvement Notice in the following terms:

> "IN served as you have failed to ensure, so far as is reasonably practicable, the health, safety and welfare of your employees and, and [sic] that persons not in your employment are not exposed to risks to their health and safety because there [are] gaps in the company's knowledge of health and safety, it does not have resources with sufficient training, experience, knowledge or qualities enabling it to properly comply with the requirements and prohibitions imposed by health and safety legislation (the relevant statutory provisions) and it has not appointed a competent person or persons to assist it to take the measures it needs to in order to fully comply with health and safety legislation. IN served as you have failed to ensure, so far as is reasonably practicable, the health, safety and welfare of your employees because you have failed to maintain the fixed electrical wiring system at your premises as may be necessary to prevent, so far as is reasonably practicable, danger, as evidenced by the poor repair of sockets and accessibility of live conductors in distribution panels. IN served because none of the company employees that I spoke to about your compressed air system could tell me about any arrangements in place to drain the receiver, I did not identify anyone knew that the process was in fact automated. I was informed that an employee had conducted an internal visible inspection of the receiver by removing an inspection hatch. The employee was not competent to perform this activity; he was also not aware of the requirements for statutory examinations. You are failing to ensure, so far as is reasonably practicable, the health, safety and welfare of your employees as you have no written scheme for the periodic examination by a competent person of the pressure vessel and pipework of the compressed air system being operated on site and you are unable to furnish me with a certificate issued by a competent person that an examination in accordance with a written scheme has been conducted so as to prevent danger. IN served because A "tick-box" grid that does not adequately identify measures that control risks,and reliance on suppliers materials safety data sheets alone to provide you with appropriate health and safety information or [that was probably meant to be "on"] storing and using flammable and hazardous substances haphazardly within the working area and failing to monitor that the controls you have in place remain effective does not amount to adequate management of the risks associated with the harmful or dangerous substances you use. You are therefore failing to

> ensure, so far as is reasonably practicable,the health, safety and welfare of your employees or that persons you do not employ are not exposed to risks to their health and safety because you do not have a system in place for the effective planning, organisation, control, monitoring and review of the requirements placed on the company by the Control of Substances Hazardous to Health Regulations 2002 (COSHH) and the Dangerous Substances and Explosive Atmospheres Regulations 2002 (DSEAR) in relation to the substances you use or generate during your manufacturing process."

26 The claimant put before me a photograph which he had taken only shortly before the hearing of 13 and 14 November 2017 of a new, large, vent at the top of the respondent's workshop. The claimant claimed that it showed that the respondent had put in place a new dust extraction system, and that that showed that his (the claimant's) concerns about dust extraction had been well-founded. Both Mr Solomon and Mr Thompson said that that new vent was part of a dust extraction system for a completely new machine, and that the new system was dedicated to that machine only. Mr Solomon said that the new machine was a very large one, the size of the hearing room. Both Mr Solomon and Mr Thompson said that no other changes had been made to the dust extraction systems in the workshop. I accepted Mr Solomon's and Mr Thompson's evidence in those regards.

(2) The reasonableness of the claimant's stated concerns

27 Both Mr Solomon and Mr Thompson said that there were in place specific means by which dust created when using any one of the sanding machines and portable saws in the respondent's possession could be extracted. They both said that when those means were used, the dust was extracted as effectively as was reasonably possible. Mr Solomon said that the static machines all had their own specific dust extraction mechanisms. Mr Thompson said that each employee was given a portable hose one end of which could be plugged into the portable sanders and the skill saws and the other end of which could be plugged into a socket on the Stork conduits to which I refer above. The claimant denied that, but I noted that Mr Fitzhugh did not make any criticism of the respondent's dust extraction methods or the respondent's precautions generally in relation to the risk to health of dust in the workplace.

28 The claimant accepted that appropriate dust masks were given to staff for at least some of the time, but alleged that the filters in the masks were changed insufficiently frequently. Mr Solomon said that the filters were changed entirely appropriately and that the claimant had misunderstood the situation. Mr Solomon said that the filter in the claimant's dust mask which the claimant claimed needed to be changed more frequently than it was, filtered out chemicals and that the claimant did not come into contact with chemicals sufficiently for it to need to be changed as frequently as the claimant claimed. I accepted Mr Solomon's evidence in that regard. I also concluded that the

respondent's arrangements for the extraction of dust and otherwise for the protection of employees from the risks to health of dust were sufficient to comply with the requirements of the relevant health and safety legislation.

29 As for the saw blades and what was required in that regard, Mr Solomon said that the board which the claimant was cutting at the time of the claimed trapping of the claimant's finger was an all-purpose blade and that a wood-only blade would not have been appropriate because the hypoxy resin on the board included metal powder in addition to the resin itself. I accepted Mr Solomon's evidence in that regard. I concluded also that the respondent provided appropriate saw blades for the use of employees on the various saws used in the workshop. I also accepted the respondent's evidence (which, as I say in paragraph 16 above, the claimant did not contradict) that the claimant did not at any time report to the respondent any injury to himself or any other employee of the respondent.

30 As for the electric shock which the claimant claimed had been caused to him by a faulty socket, I concluded that the claimant had not raised that as a health and safety issue: I accepted Mr Solomon's evidence that the claimant had not raised it with him on 21 November 2016 (or before then). I did so because I found Mr Solomon's evidence more credible in this regard (and in fact others) than that of the claimant. This was not purely as a result of hearing and seeing the witnesses (which is not always a reliable way to tell whether someone is telling the truth), it was also because the claimant had claimed that he had smelt gas in the workshop from time to time as a result of the dust burning on the workshop overhead heaters and (1) I accepted Mr Solomon's evidence that the heaters were HSE-approved, and (2) no criticism of the heating arrangements at the workshop was made by Mr Fitzhugh. It was also because the claimant refused to accept that his complaints about the levels of dust were not objectively well-founded, despite the fact that Mr Fitzhugh had not criticised the respondent's arrangements for the extraction of dust and otherwise for the protection of employees from the risks to health of dust.

31 In addition, I concluded (in part because Mr Fitzhugh made no criticism of them, but also on the balance of probabilities given that an employee could by accident get caught up in the power cord attached to any portable electrical tool) that the respondent's arrangements for the supply of power to portable power tools were reasonably safe. Similarly, the fact that Mr Fitzhugh made no reference in his improvement notice to a culpable failure to ensure that PAT tests were carried out on the respondent's portable power tools was relevant and persuaded me on a balance of probabilities that the respondent's arrangements for keeping its portable power tools safe to use were such that it could not reasonably be said that there was a risk to health and safety from using them.

32 As for the alleged assault, Mr Pearson's email of 7 August 2017 was to the effect that the claimant's back had been injured at work a day before the claimed assault (which Mr Pearson referred to as a "slap ... on the injured part of his bk to say you are ok brett"). Mr Solomon described to me what he had done, which was to give the claimant no more than a friendly pat on the back. I accepted Mr Solomon's evidence in that regard, which did not in fact differ much (if at all) from the claimant's own evidence about the event.

33 Mr Solomon said that the fork lift truck was never left in such a way that it blocked the fire exit. He also said that the criticisms of Mr Fitzhugh had been stated generally in the improvement notice, but that the criticism made by Mr Fitzhugh about the storage of flammable or hazardous substances was about the manner in which the respondent stored polishers and polishes: Mr Fitzhugh thought that they should be stored in the storage cupboard where they were kept, and not (as at that time occurred) also on top of it. Mr Solomon said that Mr Fitzhugh had called it a matter of "housekeeping" and had said that everything should have its place. I accepted Mr Solomon's evidence in that regard.

(3) Mr Solomon's reason for dismissing the claimant

34 In part as a result of the above findings of fact about the reality of the situation, namely that the respondent's workshop was fundamentally a reasonably safe place to work, but also because I found Mr Solomon to be an honest witness, doing his best to tell the truth, I concluded that the real reason for the claimant's dismissal was his inability to accept instructions from either Ms Groves or (eventually) Mr Solomon. Certainly, I concluded that the principal reason for the claimant's dismissal was none of the three reasons stated in paragraph 2 above.

My conclusions on the claimant's claims

35 I therefore concluded that the claims had to fail. In fact, I concluded also that the claimant could not in the circumstances reasonably believe that there was a risk to the health and safety of any employee, including him, arising from the circumstances which actually existed at the respondent's workshop on 21 November 2017. In addition, I concluded that there were not on 22 November 2017 "circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert" in the part of the workshop to which Mr Solomon had required him to go and work. That was because I concluded that it was not reasonable for the claimant to believe that his workplace was not safe because its dust extraction arrangements were to any extent inadequate.

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Employment Judge Hyams

Case Number: 3324009/2016

Date: …….17 November 2017……..

Sent to the parties on: 1 December 2017

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For the Tribunal Office