



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Graham Daniels

v

## Respondent

RSVP Event Hire Limited

**Heard at:** Bury St Edmunds  
**Before:** Employment Judge R Wood

**On:** 23 March 2022

## Appearances

**For the Claimant:** In person  
**For the Respondent:** Mr M Campbell, Consultant

## RESERVED JUDGMENT

The Claimant was entitled to a redundancy payment under the statutory lay off scheme (section s148-152 of the Employment Rights Act 1996).

The respondent is to pay to the claimant the sum of £10,260 by way remedy. This is a net figure to be paid to the claimant.

## RESERVED REASONS

### Claims and Issues

1. The Claimant had been a long-term employee of the respondent company. It became apparent during the course of the hearing that the Claimant and Mrs O'Connell of the respondent had been in a close working relationship for many years and had been friends. It was therefore regrettable that the arrangements between the Claimant and RSVP had come to an end in the way they did.
2. The argument presented by the Claimant was that he had been laid off and was entitled to a redundancy payment under the scheme set out in sections 148-152 of the Employment Right Act 1996 ("the scheme"). He had worked as a warehouse manager since 2003. In March 2020, all staff working for the respondent had been furloughed due to the pandemic. This included the claimant. When the furlough scheme came out an end on 31st August 2020, the respondent notified the Claimant that he was to be laid off. By letter dated 30 September 2020, the claimant wrote to his employer asking for a redundancy payment. There is some issue as to when this letter reached the respondent. In any event, the respondent issued a counter notice dated 6 October 2020 indicating that he was to be issued with work within the next 4

weeks. The letter stated that he was still employed and had not been made redundant.

3. On 24 October 2020, the respondent wrote to the claimant requesting that he return to work on 2 November 2020. However, the claimant failed to attend. Instead he asked for evidence that there would be at least 14 weeks of work for him to do, otherwise he would not be returning. He again requested a redundancy payment. There were other failed attempts by the respondent to persuade the claimant back into work during the following few weeks. The respondent requested the return of the claimant's company phone and keys.
4. On 23 November 2020, the claimant again repeated his request for the redundancy payment. When he failed to attend work on 30 November 2020 as required, the respondent began disciplinary proceedings. There was a meeting under the respondent's disciplinary policy on 8 December 2020. On the same day, the respondent sent the claimant a letter notifying him that his employment had been terminated due to breach of contract and conduct issues. The claimant now brings a claim for a redundancy payment, which is resisted by the respondent.

#### **Procedure, Documents and Evidence Heard**

5. The Hearing took place on 23 March 2022. I heard evidence from the Mrs O'Connell of the Respondent, as well as from Mr Graham Daniel, the Claimant. I also had an agreed Main Bundle of documents which comprises 98 pages ("B").
6. What appears below is a summary of the evidence. I have chosen to focus on the key aspects of the testimony so far as my relevant findings of fact are concerned.
7. There was no witness statement from the claimant. He suggested that he had overlooked the directions. It became apparent that the case had previously been listed in October 2021, when Mr Campbell had reminded the claimant of his obligation to provide a witness statement. The claimant suggested he had not been in the right frame of mind. Mr Cameron suggested that the claimant should be limited to what was in his claim form. I agreed, and we proceeded on this basis, notwithstanding the claimant's obvious failure to comply with the directions set down by the Tribunal.
8. I emailed both parties copies of a list of issues. After a short break, all agreed that they were the relevant questions. It was common ground that there had been a lay off of more than 4 weeks, and that the claimant had not been paid throughout September and October 2020. It was also agreed that the claimant had issued a notice which satisfied the scheme [51], and that a counter notice had been served by the respondent [52]. There remained a question as to when the notice was received. The outstanding issues were the four questions set out at paragraph 23 below. The parties also agreed the sum of the redundancy payment, should it become relevant, at £10,260.
9. I first heard from Mr Daniels, who confirmed that the contents of his ET1 remained accurate and true. He also adopted the content of his

correspondence in the bundle. Mr Cameron then asked him questions. As to the letter at page 51, he stated that he would have sent it on the day he wrote it, i.e. on 30 September 2020. He said he thought he would have put a first-class stamp on it, but he couldn't directly recall. He was advised by ACAS to send it to the company address, which he did.

10. He confirmed that during the relevant period he had started to work for a friend of Mrs O'Connell, repairing boxes for one a day a week. He was then asked about the letter at page 56. Mr Campbell asked if it was a letter of resignation. He said it wasn't. I asked whether he regarded himself as still working for the respondent at the time he wrote this letter. He replied no. When asked why not, he responded that he had requested details of the work that was being offered, and its duration, but Mrs O'Connell had not provided a list. He had first asked for this list in a phone call, and not in the letter at page 60. He explained he had regarded his employment as having come to an end after 8 weeks of being laid off.
11. Mr Campbell asked him about the letter at page 60. It was suggested that he must still have thought of himself as an employee otherwise why ask for a list of work. The claimant responded that he was not prepared to pack logs, which was the work he thought he would be given. Mrs O'Connell had told him this.
12. When employed, he has been in charge of managing staff, cleaning and PAT testing of electrical equipment. The warehouse is in Farnham. He said he had returned the keys and phone when requested. He had returned the phone to factory settings. He regarded it as his phone, but he wasn't that concerned about it. Referring to the meeting on 8 December, he could not recall being asked to sign any notes. He had gone to the meeting to see what Mrs O'Connell had to say. He thought it was time to meet face to face. He knew she was going to sack him, and he wanted to know the reason. He had been advised by ACAS to go to the meeting.
13. I then heard from Miss O'Connell. She adopted the contents of her witness statement. There were two amendments. Firstly, at paragraph 8, the word "register" should have read "reply to". Also, at paragraph 7, there was a missing reference to page 52 in the bundle. Mrs O'Connell explained that she was the director of the respondent company. It had been drastically affected by the pandemic. She went on to confirm the history set out above including that the claimant had been laid off from 1st September 2020. He had written a letter dated 30 September stating that the job was redundant and requesting a redundancy payment [51]. She responded by saying she expected to have work within the next four weeks, and that he was not redundant. On 2 November 2020, he reiterated that he considered himself to be redundant and asked for amounts due to him [56]. She explained that she instructed the claimant to come into work on a number of occasions but without success. On 6 November 2020, she requested that the claimant return the company phone, charger and keys [58]. By letter dated 16 November 2020, the claimant asked Mrs O'Connell for a list of jobs [60].
14. By email dated 18 November 2020, the claimant suggested that he was having problems with his vehicle and could not get to work at the moment.

He asked to take two days off as periods of unpaid leave. He did not submit holiday request forms.

15. On 1 December 2020, Mrs O'Connell requested that the claimant attend a disciplinary hearing on 8 December [70]. The meeting took place and a purported summary of what was said appears at page 71 of the bundle. He was dismissed on the grounds of misconduct [72]. Mrs O'Connell went on to state that although the claimant had indicated that he wished to be made redundant, at no time did he resign, and the fact that he wanted to take unpaid leave and enquired about the nature of the work available suggested that he did still regard himself as an employee.
16. Mrs O'Connell also answered questions at the hearing. She explained that she had received the letter at page 51 on 5 November. She was then corrected by her friend and said 5 October. At this stage, I asked her friend to leave the room for the remainder of Mrs O'Connell's testimony. She was then asked about the work that she had for the claimant if he had returned to work in November. She explained that because they had been closed for so long, each item of equipment in the warehouse would need cleaning and testing. There would also be a complete stock take of everything. She was offering this work solely to the claimant. No other member of staff was being offered work at the time.
17. Mr Daniels asked her why she had not told him this when he had requested the information. She said she had not thought it necessary. He was the manager and was aware of what needed doing to get the company back after it had been closed for Covid. She went on to state that she had offered him the work because she cared, and so that he had a job.
18. Mrs O'Connell had decided to undertake this work at the time because they thought that contract work would start to come in again. They had been led to believe that this was the case by the government. They didn't know that lock down would begin again. The work would have taken 13 weeks or more. Mr Daniels stated that it would have taken 6-8 weeks. As it transpired, the first major orders for work didn't start to come in until October 2021.
19. She explained that she had had a good working relationship with the claimant. He had been as regular as clockwork in general terms. He was in the habit of turning up for work. When he did not attend, she assumed he was working somewhere else and did not want to commit to RSVP anymore. When asked why she had asked for his keys and phone back, she stated it was for security (in relation to the keys). He had previously been trusted with keys, but since he had asked for a redundancy payment, her attitude had changed. She had asked for the phone back because he was using the phone and they were paying the bill. He had been allowed to use the phone for only limited personal use. She took the view that the claimant's whole attitude had changed and that he was no longer interested in the wellbeing of the company.
20. I asked her whether she had taken the view at the time that the claimant continued to work for the company beyond the end of October 2020. She explained that she didn't want his employment to come to an end and had kept the job open for him. If she had got the impression that the claimant had

still been with us, the issue of the keys and phone would never have come up. She stated that she had done everything she could to keep him in the team.

21. At the conclusion of the Hearing, I reserved my decision.

### Legal Framework

22. Section 148-152 of the Employment Rights Act 1996 (“ERA 1996”) is the reads as follows,

**“148**

#### ***Eligibility by reason of lay-off or short-time.***

- (1) *Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—*
- (a) *he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (referred to in this Part as “notice of intention to claim”), and*
  - (b) *before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.*
- (2) *This subsection applies if the employee has been laid off or kept on short-time—*
- (a) *for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or*
  - (b) *for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.*

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#### ***Counter-notices.***

*Where an employee gives to his employer notice of intention to claim but—*

- (a) *the employer gives to the employee, within seven days after the service of that notice, notice in writing (referred to in this Part as a “counter-notice”) that he will contest any liability to pay to the employee a redundancy payment in pursuance of the employee’s notice, and*
- (b) *the employer does not withdraw the counter-notice by a subsequent notice in writing, the employee is not entitled to a redundancy payment*

*in pursuance of his notice of intention to claim except in accordance with a decision of an employment tribunal.*

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***Resignation.***

- (1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period.*
- (2) The period of notice required for the purposes of this section—*
  - (a) where the employee is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give, and*
  - (b) otherwise, is one week.*
- (3) In subsection (1) "the relevant period"—*
  - (a) if the employer does not give a counter-notice within seven days after the service of the notice of intention to claim, is three weeks after the end of those seven days,*
  - (b) if the employer gives a counter-notice within that period of seven days but withdraws it by a subsequent notice in writing, is three weeks after the service of the notice of withdrawal, and*
  - (c) if—*
    - (i) the employer gives a counter-notice within that period of seven days, and does not so withdraw it, and*
    - (ii) a question as to the right of the employee to a redundancy payment in pursuance of the notice of intention to claim is referred to an employment tribunal, is three weeks after the tribunal has notified to the employee its decision on that reference.*
- (4) For the purposes of subsection (3)(c) no account shall be taken of—*
  - (a) any appeal against the decision of the tribunal, or*
  - (b) any proceedings or decision in consequence of any such appeal.*

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***Dismissal.***

- (1) *An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time if he is dismissed by his employer.*
- (2) *Subsection (1) does not prejudice any right of the employee to a redundancy payment in respect of the dismissal.*

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**Likelihood of full employment.**

- (1) *An employee is not entitled to a redundancy payment in pursuance of a notice of intention to claim if—*
  - (a) *on the date of service of the notice it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter on a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short-time for any week, and*
  - (b) *the employer gives a counter-notice to the employee within seven days after the service of the notice of intention to claim.*
- (2) *Subsection (1) does not apply where the employee—*
  - (a) *continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and*
  - (b) *is or has been laid off or kept on short-time for each of those weeks.*

.....”

23. In the light of the issues already agreed between the parties, there are four outstanding questions to be addressed in this claim, arising as they do from the statutory provisions above:

- 23.1. Did the Claimant resign his employment? If so when? section 150 of the 1996 Act
- 23.2. Was the Claimant dismissed by the Respondent? s.151
- 23.3. At the date of the notice, was it reasonably to be expected that the Claimant would enter into a period of employment not later than 4 weeks after that date, for not less than 13 weeks? s.152
- 23.4. Did the claimant continue to be laid off for a period of 4 weeks after the date of the service? s.152

**Findings and Reasons**

Did the claimant resign his employment, and if so, when?

24. In the context of this case, it is for the claimant to prove that he satisfied the requirements of the scheme. He must do so on a balance of probabilities.
25. The first thing to say is that the evidence in this case presents a fairly confusing picture. It is not a straightforward exercise to try to determine the nature of the relationship between the claimant and respondent. It is apparent that both were receiving legal advice in an attempt to navigate the complex provisions of section 148-152 of the 1996 Act. They are not easily applied, and it is clear to me that both parties struggled to understand their obligations. This is understandable and it is not a criticism of either party, who were trying to do their best in the circumstances.
26. In so far as the question of whether the claimant resigned his employment with the respondent, there is evidence supporting both arguments. In my judgment, the correct approach to interpreting the evidence in this case is to look at the conduct and language of the parties, and in particular the claimant's, in context, where possible giving communications their ordinary meaning.
27. It is correct to state that the claimant did not, at any time, utter the words "I resign", either verbally or in writing. What he says is that he repeatedly stated that he regarded himself as having been made redundant and used other words which constituted a resignation. In particular, at page 51 of the bundle, he states "...I therefore feel that my job is redundant". At page 56 he states, "I disagree with your conclusion that I am not redundant.....I now consider myself redundant". In my view, by claiming on more than one occasion that he considered that he had been made redundant, it is clear that the claimant was stating that he was no longer employed. It is consistent with this view that he asks repeatedly for a redundancy payment, which he could not be entitled to if he was still employed by the respondent.
28. There is other evidence which is consistent with this view. Despite several attempts by Mrs O'Connell, the claimant failed to attend work when requested in November. Mrs O'Connell accepted that this was most uncharacteristic for Mr Daniels, who was otherwise a reliable worker. Mrs O'Connell gave evidence that they had previously been in good terms. I can therefore infer that there must have been a good reason for the claimant not coming to work as requested by his employer.
29. The claimant gave evidence that he had found other work during his lay off. He was carrying out work for a friend of Mrs O'Connell, albeit for only one day a week. This was not challenged by the respondent. It is reasonable to assume that Mrs O'Connell was aware of this fact. During his testimony, Mr Daniels stated that at the time he wrote the letter at page 56 on 2 November 2020, he no longer regarded himself as being employed by the respondent. This was because he had requested details of the proposed work, and he had not been provided with any by Mrs O'Connell. I accept this part of his testimony, in that I accept that the claimant was attempting to resign from his employment during this period and considered himself to be no longer an employee.



30. I have carefully considered the arguments put on behalf of the respondent by Mr Campbell on this point. Primarily, he relies on three aspects of the evidence. Firstly, that the claimant attended the disciplinary hearing on 8 December. Secondly, that he sought permission to take unpaid leave on 18 November [63]. Thirdly, that he had sought clarification of the nature of the work proposed [60]. I accept that this is conduct which, on its face, is inconsistent with the termination of the contract by the claimant. However, in my view it is important to view all this in context. The claimant and Mrs O'Connell had had a long and relatively close working relationship. Mrs O'Connell was clearly reluctant to lose the claimant. She would not accept what was, in effect, Mr Daniels stating he was no longer part of the "team". I take the view that these steps by the claimant were the result of a feeling of residual obligation to Mrs O'Connell born out of friendship.
31. In any event, the wording used by the claimant in the correspondence I have referred to above was, in my judgment, unambiguous. By 2nd November 2020, the claimant had resigned and expressed the view that he was entitled to a payment under the scheme. As a result, he repeatedly ignored demands for him to come to work. In a sense, what could be clearer. If there was conduct which was potentially inconsistent with the unambiguous words, then as a matter of legal interpretation, the words must take precedence. The claimant was entitled to give notice of termination under the terms of the contract of employment. It is my view that he did so on 30 September, and his one-month notice period expired on or about 29th October 2020.
32. I would also add that there was conduct on the part of Mrs O'Connell which strongly suggested that she too had treated the claimant's employment as at an end at certain times. In particular, I refer to her request for the return of his company phone and keys. She told me that her attitude towards him changed once she realised that he was no longer interested in the wellbeing of the company. She then viewed him as a security issue. She went on to say that these issues would never have come up if she still had the impression that the claimant was still with them. She first requested the keys on 6 November, shortly after receiving the claimant's letter of 30 October 2020. In my view, this is entirely consistent with Mrs O'Connell construing the 30 October letter as one of resignation. The conduct of both parties was, at times, confusing. However, as stated, their words of the claimant were unambiguous.

Did the respondent dismiss the claimant?

33. It follows from my findings above that the claimant was no longer an employee by the date he was purportedly dismissed on 8 December 2020. As a matter of law, I therefore find that he could not have been dismissed by the respondent.

At the date of the notice, was it reasonably to be expected that the Claimant would enter into a period of employment not later than 4 weeks after that date, for not less than 13 weeks?

34. This issue is to be judged on the evidence as it was at the date of the notice, that is on or about 30 September 2020. However, the Tribunal is permitted to

look at events which occurred afterwards in so far as they shed light on the situation as it existed at the time of the notice.

35. The background to this case is dominated by the pandemic. The hospitality industry had been dramatically affected by the lock down of March 2020, and by the continuing restrictions imposed thereafter. The respondent had not traded since March 2020. Although furlough ended on 31 August 2020, the evidence given to me by Mrs O'Connell was that the company did not start to trade again to any significant extent until October 2021. In my judgment, on 30 September 2020, there was no immediate prospect of the respondent resuming trading as it had done prior to the pandemic. Indeed, this was not Mrs O'Connell's case.
36. She sought to argue that the work which was to be made available to the claimant was of a preparatory nature. Mrs O'Connell claimed that she required the claimant to return to carry out cleaning and testing of equipment. It was apparent that he was the only member of staff to return at that stage. According to her own testimony, she was attempting to preserve the claimant's job because she cared about him.
37. I am afraid I do not accept Mrs O'Connell's evidence on this point. I find that there was little if any work genuinely available in October/November 2020. Moreover, I do not accept that what work there was, amounted to at least 13 weeks of employment.
38. Given that there was no prospect of a return to normal trading, it seems implausible that the respondent would decide to expend time and money on testing and cleaning equipment and premises. Moreover, when asked on more than one occasion at the time, she was unable to explain to the claimant what work he would be doing if he returned. If this work was genuinely available, then I find it surprising that she would not simply provide the information. I was at all impressed by her testimony when challenged about this. She stated that there had been no need to tell the claimant, as he was the manager and knew what was required. The claimant had made it quite clear that the provision of this information was a prerequisite of his return. I am in no doubt that if such work had been available, then Mrs O'Connell would have told the claimant in clear terms, as the scheme requires.
39. Instead, she gave no indication as to what he was to do, or how long it might last, save for the comment at page 57 that it would last at least 13 weeks. She was getting advice, as was the claimant, as to the requirements of section 152(1) of the 1996 Act. Her failure to expand on this detail leads me to infer that the work was not available, either of the nature suggested, or the duration claimed. It is my view that Mrs O'Connell was trying to buy time, in the hope that the trading climate might improve dramatically. As of 30th September 2020, this was optimistic in the extreme, and not based on reasonable expectations. I find this part of the case proved.

Did the claimant continue to be laid off for a period of 4 weeks after the date of the service? s.152

40. The situation is that the claimant was not invited back to work until 2 November 2020. As will be seen above, there is some issue as to what work was in fact available in early November, but for the purposes of this question, I will set this point to one side. In order to satisfy this part of section 152 of the 1996 Act, the notice must have been issued not more than 4 weeks before the commencement of the resumption of work.
41. The date of the notice is of some controversy in this case. There is no issue that it was written on 30 September 2020, which was a Wednesday. Neither was there any issue that it was sent to the company address. However, it was Mrs O 'Connell's testimony that it was not picked up by her until 5 October, which was a Monday. I accept this evidence. She also told me that she did not go into the office on either Saturday or Sunday (3 and 4 October 2020).
42. I accept that the claimant sent it on the day he wrote the letter. He seemed to me to be less forthright about whether he put a first or second-class stamp on it. However, in keeping with the fact that this was a relatively urgent piece of mail, I find that he was more likely than not to have sent it by first class post. In which case it would have got there on 1st October. Even if the claimant had put a second-class stamp on the letter, it would be deemed to have arrived within 3 working days (see Civil Procedure Rules) i.e. by 3 October. It is the date when the notice arrives at the company address, and not when Mrs O'Connell actually first sees and open the correspondence which is material in this context.
43. In either case, the requirements of section 152 are made out. If the notice arrived on 1 October, then the four week expires on 28 October. If the letter arrived on 3 October, then four weeks elapsed on 30 October.
44. Accordingly, the requirements of sections 148-152 are made out. The claimant was entitled to a redundancy payment, which was agreed at £10,260. This is a net figure to be paid to the claimant.

Employment Judge R Wood

Date: 17 May 2022

Sent to the parties on: 19 May 2022

For the Tribunal Office