

THE INDUSTRIAL TRIBUNALS

CASE REF: 1687/12

CLAIMANT: Arpad Fejes

RESPONDENT: William Keys and Sons Limited

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unfair dismissal, constructive dismissal, and automatically unfair dismissal are dismissed, as are his claims of discrimination under the Race Relations (Northern Ireland) Order 1997.

Constitution of Tribunal:

Chairman: Mr D Buchanan

Members: Ms M E Bailey
Mr J Barbour

Appearances:

The claimant was represented by Ms N Fee, Barrister-at-Law, instructed by Murnaghan Colton, Solicitors.

The respondent company was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Millar McCall Wylie, Solicitors.

- 1(i) The claimant, a Hungarian national, by a claim form presented to an industrial tribunal on 3 September 2012 alleged that he had been unfairly dismissed, and discriminated against on the ground of his race by the respondent company. He alleged both automatically and 'ordinary' unfair dismissal, and also constructive dismissal in the alternative. The allegations of race discrimination included an allegation that the act of dismissal was discriminatory.

All these allegations were denied by the respondent company, which claimed that he was not dismissed, but rather that he resigned from his employment.

A list of the main legal and factual issues, agreed by the parties at a Case Management Discussion held on 8 November 2012, is set out at **Appendix A**.

- (ii) In order to determine this matter the tribunal heard evidence from the claimant, Mr Fejes, and the following witnesses on his behalf : Mr Arpad Valkos, and Istan Kovacs, his fellow workers, and Mr Niall Fox, the claimant's solicitor. (Mr Fox gave evidence relating to the translation and recording, from Hungarian into English, of a witness statement made by Mr Valkos. His evidence was not challenged and ultimately little, if anything, turned on it.) The following witnesses gave evidence for the respondent company : Mr David Graham, its paint facilities manager, Mr Lynden Keys, a director of an associated company, but who also played a role in the running of the respondent company, Ms Keelin Duddy, the Head of the Human Resources Department, and Mrs Margaret McCaughey, also employed in its HR Department.
 - (iii) The tribunal also considered the extensive documentary evidence to which it was referred.
 - (iv) The proceedings were unavoidably lengthened by the use of an interpreter. Unfortunately in this case that process was not without its difficulties. However, we would emphasise that we have not based any judgment on the credibility of any witness on any apparent hesitation or uncertainty in giving evidence through an interpreter.
 - (v) The tribunal finds the facts set out in the following paragraphs.
- 2(i) The claimant, Mr Fejes, was employed by the respondent company as a spray painter. He worked in the painting and polishing workshop at its plant and equipment auction premises in Dromore, County Tyrone. He also did work at associated companies, where he appears to have been given instructions about his work by a Mr William Keys.
- (ii) He had originally started work with the respondent company in January 2006, but it is accepted that there was a break in his continuity of employment, and that for the purposes of this claim he commenced employment on 4 July 2011 and it continued until it ended, in disputed circumstances, on 30 July 2012.
 - (iii) The reason for the break in continuity was that the claimant had left to take a job in Wales, the firm he went to there got into difficulty, his hours were reduced, and he came back to Northern Ireland.

Mr Lynden Keys was happy to take him back. In fact both the claimant and Mr Lynden Keys gave evidence that they regarded each other as friends. The claimant was looked upon as a good worker and he had never received any disciplinary warnings.

However, although the claimant made no complaint against Lynden Keys, he did allege for the first time in his evidence that William Keys had made remarks of a racially abusive nature to him some time in 2007. This had not been mentioned in his claim form or his witness statement (which is surprising in a case which involves allegations of race discrimination). Nor did he make any complaint about this at the time, or when he came back to work from Wales in 2011. We also find it surprising

that he never raised this, even informally, with Lynden Keys, with whom he enjoyed good relations.

- (iv) On 26 March 2012 the claimant sustained injuries to the little finger of his right hand while at work. By an agreement of 30 April 2012, he accepted the sum of £10,000.00 in respect of his injuries. This agreement contained, among other provisions, a clause providing that the claimant would not resign from his employment at any time up to and including 12 June 2013.

It was stated that if he did so the respondent would have the right to recover all or any of the compensation payment. We found this of particular significance in the circumstances of this case where the main issue was whether the claimant had resigned, or had been dismissed.

- 3(i) In May 2012, the respondent company appointed Mr David Graham as manager of the paint workshop. Mr Graham had a background in painting and his brief was to oversee the workings of the paint shed operation and to ensure that the maintenance of machinery was carried out to an appropriate standard. The company exported a lot of machinery to Australia and there were strict Australian laws governing the standards of imports with which the company was required to comply.
- (ii) We are satisfied that before Mr Graham's appointment there was little supervision of the claimant and his fellow workers in the paint shop and we reject the claimant's evidence to the contrary. The Keys family members did not have a substantial presence at the premises because they were heavily committed to attendance at auctions.
- (iii) The claimant's evidence, and that of his witnesses, who were his colleagues in the paint shed, was that Mr Graham was 'forceful' and intimidatory, and that as far as the claimant was concerned, his work was subject to greater scrutiny than that of the others. By way of example, Mr Graham allegedly yanked a paintbrush out of the claimant's hand and continually complained about the slowness of his work, despite the latter still suffering from the effects of his hand injury around the time Mr Graham joined the company. Generally, Mr Graham was aggressive towards the Hungarian workers, and showed his dislike of them. Mr Valkos said that since Mr Graham arrived the atmosphere had been awful.
- 4(i) On 19 June 2012, there was an incident involving the claimant and Mr Graham. The respective accounts of the two protagonists differ fundamentally. We accept the evidence of Mr Graham that the claimant was unreceptive to the new techniques and methods that he had introduced, and queried why he was introducing changes to working practices that had been carried out for years. We find that on this occasion the claimant questioned Mr Graham's experience of, and competence in, bodywork restoration and told him that he '*hadn't a clue what [he] was talking about*'. Mr Graham informed him that if he displayed that sort of attitude again, he would have no alternative but to take disciplinary action against him.
- (ii) The claimant denied Mr Graham's version of events, and said that he always talked respectfully to him. He further denied challenging Mr Graham on an almost daily basis, and also that the latter had warned him of possible disciplinary action. He

did accept that Mr Graham had said on 'a couple of occasions' that workers' breaks were taking too long.

- (iii) Mr Graham's account of what took place is supported by his diary entry of 19 June 2012 which makes reference to the claimant not working to full capacity, taking too long to perform tasks, and questioning Mr Graham's experience. It also makes references to disciplinary warnings.
 - (iv) Despite what happened on 19 June 2012, Mr Graham's diary entry for the following day, 20 June 2012, notes among other things, that the claimant was 'working much better'. This supports Mr Graham's evidence that he did not have an aggressive or intimidatory attitude to the claimant, but rather that he viewed the claimant as someone who was good at his job, generally had potential, but unfortunately had an unwillingness to adapt to new methods or accept instruction or advice. We are satisfied that Mr Graham wanted to work constructively with the claimant and his colleagues, to address these issues, and he was sufficiently realistic to realise that in a situation where the claimant and his colleagues had been left largely unsupervised in the past, the achievement of his objectives for the paint workshop was not something which was going to happen overnight, but would be a gradual process, over a period of time.
- 5(i) The issue of workers taking breaks which were too long arose again on 30 July 2012 and was the catalyst for events which led to the end of the claimant's employment with the respondent company. Again there is a direct conflict of evidence which the tribunal must resolve.
- (ii) On that afternoon, Mr Graham noticed five employees, including the claimant, arriving back at work 10 minutes later after their tea break. As this was an ongoing problem, Mr Graham felt that he, as a manager, had to address it. He spoke to the men, using the claimant, whose English he considered to be good, to translate for him. He emphasised that their break should have ended at 4.15 pm. He also commented, based on his observations, that productivity had not been good that day.

He indicated that, between them, they should have worked thirty-five hours that day whereas, based on his observations, he estimated that they had not put in 20 hours in total. According to the claimant, Mr Graham told him "*you are working very slow and I can sack you. Go home. You haven't worked well today*"

- (iii) The majority of the employees returned to their work places, but the claimant said that he had had enough of the place, was going home and was not going to take any more orders from Mr Graham.

He was aggressive, and shouted at Mr Graham. Although he did this in Hungarian, he used the 'f' word frequently.

Mr Graham warned him that if he did leave the work premises – he would have been leaving early – he would be reported and disciplinary action would follow. He subsequently approached the claimant and told him that if he was not going to perform his duties, he would need to clock out. The claimant was again abusive towards him and questioned Mr Graham's abilities and knowledge. The claimant's

version of this is that Mr Graham approached him and said to him “*Get out of the yard, you are sacked. You cannot be here*”.

- (iv) Mr Graham did not have any further involvement with the claimant that afternoon – the latter was picked up by his wife at around 5.00 pm and left the premises. Mr Graham told Lynden Keys what had happened. Lynden Keys said he would deal with the situation. According to Mr Graham, Lynden Keys’ view was ‘*that the claimant had just gone off on one and that it would be OK*’.
- (v) Mr Graham’s evidence was that he remained calm throughout the incident, and that at the time he did not believe that it would end up in the claimant leaving the company. In particular, Mr Graham denies telling the claimant that he was ‘sacked’ or that he abused him, racially or otherwise.
- (vi) Documentary evidence, in particular, a subsequent memo from David Graham to Margaret McCaughey in HR, and from her to Keelin Duddy, is largely consistent with Mr Graham’s account of what took place. The latter records:-

“Davy said as long as you know you are leaving of your own accord and not being sacked.”

Mr Graham’s diary entry of 30 July 2012 is also consistent with his account of events.

- 6(i) The following day, 31 July 2012, the claimant came to the respondent company’s HR Office, and saw Mrs McCaughey (David Graham also rang her that day, and told her of the incident the previous day involving the claimant). He asked for his P45 and said that David Graham had been rude to him in front of the other men. Mrs McCaughey suggested that he speak to David Graham in an attempt to resolve the situation but he was adamant that he would only speak to Lynden Keys.
 - (ii) Lynden Keys contacted the claimant and arranged to meet him on 1 August 2012. At 9.00 am on that morning the claimant attended the HR Office and the work premises and again asked for his P45, though at 11.00 am on that morning Lynden Keys asked that the claimant’s P45 be held until the claimant had decided what to do.
 - (iii) When Lynden Keys did meet with the claimant on 1 August 2012 he reassured the claimant that he still had a job, told him not to make any rash or hasty decisions and to take a period of time to reflect. He asked the claimant to contact him or HR by 6 August 2012 to let the respondent know what he intended to do. Lynden Keys was of the view that the claimant had resigned but, notwithstanding this, that he would return to work upon re-consideration of his position. The claimant did not say at any time to Lynden Keys that Mr Graham had sacked him, nor does it appear that at any time did he raise any grievance, formal or otherwise, about the way Mr Graham behaved towards him. It is surprising that if the claimant did have issues with Mr Graham, he did not mention them to Lynden Keys, considering that both accepted that they got on well.
- 7(i) The claimant did not contact Lynden Keys or the company’s HR Department by 6 August 2012 as he had been asked to do. Notwithstanding that, Ms Duddy, the Head of HR, tried to contact the claimant by phone on a number of occasions on

7 August 2012 and left voicemail messages for him. She tried to contact him again the following day, again without success. She then issued a letter to him on the same date stating that in view of his failure to contact the company it had decided to accept his resignation.

- (ii) We are satisfied from the evidence of both Ms Duddy and Lynden Keys that even after the company had issued its letter of 8 August 2012 accepting the claimant's resignation, he would have been given his job back if that is what he had wanted.

- 8(i) As far as the claimant's termination of employment is concerned we are satisfied that he resigned voluntarily and was not dismissed by the respondent company. We found some of the claimant's evidence disingenuous and his witnesses unreliable.

Mr Graham, on the contrary, was consistent, and unshaken in his account of what happened despite a lengthy, probing and sometimes hostile cross-examination. His account of what happened is supported by the documentary evidence to which we have referred.

- (ii) No one in the company wanted the claimant to leave, for despite any difficulties, he was regarded by not only Lynden Keys but also by Mr Graham, as a good worker with potential.

Mr Graham, Ms Duddy and Lynden Keys all thought that the matter would be resolved, and the claimant would return to work.

- (iii) The claimant's request for his P45 on two occasions was on the face of it a clear and unambiguous act.

However, in the circumstances of this case, the respondent company's directors and managers did not take this view, but felt rather that the claimant's action may have been taken in the heat of the moment. They did not act precipitately in accepting his resignation but allowed a reasonable time to elapse to see if that was what the claimant really intended. Ultimately, they wrote to him on 8 August 2012 accepting that resignation.

As a consequence of our findings that letter cannot be construed as an alternative act of dismissal either.

- (iv) We also reject the submission that if the claimant resigned the facts are such that it amounted to a constructive dismissal. We find that there was nothing in the conduct of the respondent company's managers, in particular Mr Graham, which could be regarded as a significant breach going to the root of the claimant's contract of employment, entitling him to resign. Although Mr Graham had difficulties with the claimant he had overall a high regard for his abilities and wanted to work with him in a co-operative fashion and bring him on board.

- (v) No issue of automatically unfair dismissal now arises.

- 9(i) We are not satisfied that the claimant was subjected to any form of racial discrimination or abuse by Mr Graham. The firm had a good record in employing immigrant workers and while there is some evidence of other Hungarian employees leaving the firm around the time the claimant resigned, there is insufficient evidence

of the circumstances of their departure for us to draw any conclusions. Of more significance in this regard is the fact that there is no record of the claimant making any allegations of racial discrimination against Mr Graham before he instituted these proceedings.

- (ii) In reaching the above conclusion we have borne in mind Article 52A of the Race Relations (Northern Ireland) Order 1997, as amended,.

We have also had regard to ***Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong Chamberlain Solicitors and Another v Emokpae; and Brunel University v Webster [2006] IRLR 258***, where the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race, and disability discrimination. This guidance is now set out at an Annex to the judgment in the ***Igen*** case, op.cit 269,270.

We therefore do not set it out again, but we have taken it fully into account.

These cases were considered more recently by HM Court of Appeal in Northern Ireland in ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8*** and ***Nelson v Newry & Mourne District Council [2009] NICA 24***.

In the former Coghlin LJ, at *Paragraph 16* of the judgment, emphasised the need for tribunals hearing cases of this nature to keep firmly in mind the fact that such claims are founded upon an allegation of discrimination. This was re-emphasised by Girvan LJ, at *Paragraph 24* of the judgment in the latter case.

10. The claimant's claims are dismissed.

Chairman:

**Date and place of hearing: 23 – 25 January 2013; and
22 February 2013, Belfast**

Date decision recorded in register and issued to parties:

APPENDIX A

**THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION
(DISCRIMINATION)**

CASE REF: 1687/12

CLAIMANT: Arpad Fejes

RESPONDENT: William Keys & Sons Ltd

DATE OF HEARING: 8 November 2012

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: Ms N Fee, Barrister-at-Law, instructed by
Murnaghan Colton, Solicitors.

RESPONDENT BY: Mr J Cunningham, Solicitor, of Millar McCall Wylie,
Solicitors.

**Case Management Discussion
Record of Proceedings**

1. **Legal and factual issues**

An agreed list of legal and factual issues is attached to this Record of Proceedings.

2. **Preliminary issues**

There are no preliminary issues requiring a separate pre-hearing review.

3. **Interlocutory matters**

The parties indicated that they could deal with these between themselves without recourse to the tribunal.

4. **Orders**

In accordance with Rule 10(1) of the Industrial Tribunals Rules of Procedure 2005, I make the following orders, by consent:-

(i) **Witness Statements**

- (a) The claimant and any witness he wishes to call must provide a witness statement to the respondent's representative by **6 December 2012**.
- (b) The respondent and any witness it wishes to call must provide a witness statement to the claimant's representative by **10 January 2013**.
- (c) **A witness statement must be a complete statement of the evidence relating to the issues, in respect of both liability and remedy, in the case, that the witness wishes to give to the tribunal. A witness will not be permitted to add to his statement without the consent of the tribunal. Consent will only be given where there is good reason for doing so.**

Witness statements should commence with an introductory paragraph which identifies the witness and explains the relevance of the witness to the claim, eg claimant, line manager, member of interview panel, etc.

The statement should then use the factual issues agreed [or identified] at Paragraph A above and set out the witnesses' evidence [if any] in relation to each factual issue chronologically. The witness statement should finish with a short summary paragraph.

Witness statements may not exceed 5,000 words unless otherwise directed by the tribunal.

- (d) Witness statements will not be read aloud to the tribunal, subject to the discretion of the tribunal hearing the case.
- (e) Witness statements will be read by the tribunal prior to the commencement of the hearing.

(ii) **Schedule of Loss**

The claimant must provide to the respondent's representative a schedule of all financial loss claimed by the claimant, setting out in particular the nature and amount of any such loss claimed and how that sum is made up, by **6 December 2012**.

(iii) **Bundles**

Three agreed bundle of all relevant documents along with three copies of a separate folder containing the witness statements, must be lodged in the Office of the Tribunals by **18 January 2013**. Any documents referred to in the witness statements must be identified by page number in the bundle. One further set of the bundle and of the

witness statement folder must be brought to the Office of the Tribunals not later than **9.30 am** on the first day of the hearing:-

- (a) the bundle must contain only those documents which are necessary for the tribunal to hear and determine the claim. The bundle is not meant to contain all documentation which has been disclosed between the parties, documents should appear only once in the bundle;
- (b) the bundle must contain a detailed index and each page in the bundle must be clearly and consecutively numbered;
- (c) each document must appear in chronological sequence;
- (d) the bundle may not, without the consent of the tribunal, contain more than 200 pages.

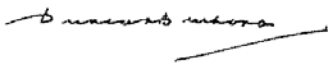
(iv) **Date of Hearing**

The hearing will be from:-

21 – 25 January 2013

The tribunal will read the witness statements between **10.00 am** and **1.30 pm** *on the first day of hearing* and the substantive hearing will commence **immediately** thereafter. Parties and witnesses must be in attendance at that point.

Parties and their representatives should note that if any matters arise which require a further direction or order by the tribunal, they should **immediately** notify the Office of the Tribunals of that matter and attend at **10.00 am on [the first day of hearing]** so that such matters can be resolved.

Chairman: 

Date: 9 November 2012



1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.
2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.
3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.
4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

Case No 1687/12IT

IN THE OFFICE OF THE INDUSTRIAL TRIBUNAL AND FAIR
EMPLOYMENT TRIBUNAL

Between

ARPAD FEJES

Claimant

And

WILLIAM KEYS & SONS LIMITED

Respondent

LIST OF ISSUES

Legal Issues

1. Was the Claimant, dismissed by the Respondent or its servants or agents? If so, was the dismissal unfair?
2. Whether the dismissal was automatically unfair?
- CHAIRMAN: ^{in his submission} Did the Respondent constructively dismiss the Claimant pursuant to Article 127(1)(2) of the Employment Rights (Northern Ireland) Order 1996? Specifically:
 - a. what conduct of Respondent does the Claimant allege amounts to a fundamental breach of the Claimant's contract of employment?
 - b. does that conduct so amount to a fundamental breach of contract?
 - c. did the Claimant resign in response to that alleged breach of contract?
4. Did the Respondent discriminate against the Claimant on the grounds of his race during the Claimant's employment?
5. Was the Claimant discriminated against, treated less favourably subject to detriment or harassment, and/or dismissed contrary to 3,4 and 6 of the Race Relations (Northern Ireland) 1997 and/or any amendment thereto;
 - (a) Who is/are the comparator(s) relied upon by the Claimants in bringing this claim?

(b) For the comparator; identify all relevant factors (if a real person) or all the relevant factors (where hypothetical).

6. Whether the Claimant is entitled to an uplift due to any failure by the Respondent to follow statutory procedures.

Factual issues

7. Whether the Respondent's manager, Davey Graham, told the Claimant he was sacked on 30th July 2012;
8. Whether the Claimant was entitled to conclude from the Respondent's words and actions, that he had been dismissed by the Respondent;
9. Whether Davey Graham told the Claimant that one Irish man can do the work of 5 Hungarians;
10. Whether Davey Graham told the Hungarian workers that they would all be sacked;
11. How many Hungarians were sacked in and about the same time as the Claimant's dismissal;
12. What were the new methods and techniques implemented by Davey Graham;
13. What form did training and instruction by Davey Graham take, in relation to those new methods and techniques;
14. When did the training and instruction take place and in what language was it conducted;
15. What was the Claimant's response to the alleged training and instruction and methods and techniques;
16. Whether the Respondent had instituted any disciplinary procedure in respect of the Claimant at any time prior to dismissal;
17. Whether the Claimant at any time, either by his words or actions, expressly or impliedly communicated to the Respondent or caused to the Respondent to believe that he wanted to resign;
18. Whether there was any contributory fault on the Claimant's part;



19. Whether the Claimant stated that Davey Graham hadn't a clue what he was talking about on 19th June 2012.
20. Whether the Claimant cursed and swore at Davey Graham and asked him how Irish men could be so smart on 30th July 2012.

MURNAGHAN COLTON
6TH NOVEMBER 2012