



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Schofield

**Respondent:** C Sparks and Sons Limited

**Heard at:** Nottingham (CVP)      **On:** 2 August 2021 &  
17 November 2021

**Before:** Employment Judge Victoria Butler  
Ms C Hatcliff  
Mr M Alibhai

## Appearances

For the Claimant: Ms S King, Counsel

For the Respondent: Mr G Ridgeway, Counsel

## *Covid-19 statement:*

*This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic*

# RESERVED JUDGMENT

1. The Claimant's claim that he was automatically unfairly dismissed for asserting a statutory right fails and is dismissed.

# REASONS

## Background

1. The Claimant was employed by the Respondent as a Night Shunter from 14 November 2019 until his summary dismissal on 14 December 2020. He claims automatically unfair dismissal and wrongful dismissal.

2. The Claimant presented his claim to the Tribunal on 12 March 2021 following a period of early conciliation between 14 and 15 January 2021. The Respondent presented its defence on 4 May 2021.

**The issues**

3. There was no agreed list of issues presented at the hearing, but the issues for determination are:
  - 3.1 Did the Claimant assert a statutory right?
  - 3.2 Was that assertion made in good faith?
  - 3.3 Was that assertion the reason, or principle reason, for the Claimant's dismissal?
  - 3.4 What was the Claimant's notice period?
  - 3.5 Was the Claimant paid for that notice period?
  - 3.6 If not, was the claimant guilty of gross misconduct?

**The hearing**

4. The case was heard on 2 August 2021 and 17 November 2021. There was insufficient time after the conclusion of the witness evidence and submissions for us to deliberate and give judgment, so our judgment was reserved.
5. At the hearing, the parties presented a chronology, an agreed bundle of documents and witness statements. References to page numbers in this judgment are references to the page numbers in the agreed bundle.
6. We received and considered written submissions from both parties which were supplemented by oral submissions on 17 November 2021. The Claimant submits that his dismissal for gross misconduct was a sham disguised to hide the real reason for his dismissal, namely his assertion that he was entitled to his full wages.
7. The Respondent denies the claim in its entirety.

**The evidence**

8. We heard evidence from:

On behalf of the Respondent:

- Mr Christopher Self, General Manager
- Mr David Mills, Financial Controller

On behalf of the Claimant:

- The Claimant

9. We were satisfied that the Respondent's witnesses were entirely credible.
10. Conversely, the Claimant's evidence was not credible. We say this because he gave three differing accounts of how the e-mail in question was viewed by his colleague, Dominic Phillips and we address this in more detail below.

### **The facts**

#### *Background*

11. The Respondent is a transportation and haulage company employing circa 149 employees across the UK. It has a comprehensive disciplinary procedure which provides that '*making untrue allegations in bad faith against a colleague*' amounts to gross misconduct (pages 78 – 80).
12. The Claimant commenced employed as a Night Shunter on 14 November 2019 based at the Respondent's Kegworth operation on the Refresco site. Prior to him commencing employment, the Respondent introduced paid breaks as a temporary measure to ensure that deliveries were made in time and that employees were not stopping after being stuck in traffic to take a break, thereby delaying deliveries.
13. The Claimant was issued with a contract of employment which provided for one week's notice for each complete year of continuous service up to a maximum of twelve weeks (pages 49-73). The Claimant signed the contract on 15 May 2020 and it was signed by Mr Habib Safder, Regional Operations Manager, on behalf of the Respondent. The provision relating to paid breaks was incorporated into his contract in error on the mistaken understanding that the change was permanent. Consequently, the Claimant was not paid for his breaks and he issued a claim in the Employment Tribunal in respect of unauthorised deductions from his wages.
14. The Respondent ultimately acknowledged that the Claimant was entitled to be paid in accordance with his contract and entered into settlement discussions via ACAS.
15. In the course of complying with the Tribunal's case management orders, the Claimant and Mr Chris Self, General Manager, exchanged correspondence. On 16 November 2020, Mr Self e-mailed the Claimant and explained the background to the temporary introduction of paid breaks and that his contract of employment had been edited without authority. Mr Self said:

*"the investigation that I have completed subsequently shows that the correct process was not followed by the Management team in Kegworth. They have provided you with a contract that has been edited without authority and not*

*signed by a suitably senior member of the Staff within Sparks and also failed to return the contract to Head Office for signing.....This situation is clearly unfortunate and we recognise that this therefore needs to be addressed hence the appropriate offer currently made to you via ACAS” (page 91)*

16. The Claimant spoke freely about the Tribunal claim to his colleagues and on 19 November 2020, was talking about Mr Self’s e-mail. It was the Claimant’s view that Mr Self blamed Mr Safder for the error in his contract.
17. Mr Dominic Phillips, Transport Night Supervisor, asked the Claimant if he could see the e-mail. The Claimant obliged and went into the Shunters room to get his phone. He opened the e-mail and handed his phone to Mr Phillips so he could read it. Mr Phillips asked the Claimant whether Mr Safder knew about the e-mail and he replied that he was unsure.
18. Mr Phillips also asked the Claimant if he could take a photo of the e-mail so he could show Mr Safder, to which the Claimant agreed. The Claimant put his phone on the table and Mr Phillips took the photo and passed back the phone. The Claimant was fully aware that it was Mr Phillips’ intention to show the e-mail to Mr Safder. This interaction was witnessed by an employee of Refresco, Ms Sarah Price.
19. On 20 November 2020, Mr Phillips sent a copy of the e-mail to Mr Safder under message *“Thought you should know! I’m leaving and have got nothing to lose in telling you”* (page 124).
20. When the Claimant became aware that Mr Phillips had sent the e-mail to Mr Safder, he realised that there may be repercussions for him. Accordingly, he told the night shift supervisor, Mr Mark Page and his manger, Ms Kristy Hall that Mr Phillips has taken a photo of the e-mail without his consent in order to shift any blame to Mr Phillips. Mr Page and Ms Hall suggested he make Mr Self aware of the situation.
21. On 22 November 2020, the Claimant e-mailed Mr Self *“to report a breech (sic) of confidentiality that has put me in a very awkward position to say the least. I am regarding this a malicious act and need you all to be informed as to how this has come about”*.
22. The Claimant went on to explain that he was reading Mr Self’s e-mail and a conversation was instigated by Mr Phillips about the e-mail. He said;

*“I was reading the email from Christopher Self to myself in the office. A discussion ensued instigated by Dominic ..... The content of the conversation being that Dominic was saying that Chris Self was wrong in his opinion. At this point I had to go over to Sarah and put my phone down on the desk. She was allocating me work and it required my full attention. Momentarily whilst distracted by Sarah and the job in hand, Dominic went to my phone and screen shotted my email, he then duly passed it on to Habib. This was on Thursday evening 19<sup>th</sup> November 2020 but he sent it to Habib on Friday 20<sup>th</sup> November*

*2020. When I found out what had occurred I spoke to Mark the night supervisor and to my manager Kristy Hall. Mark and Kristy were under the impression I had agreed to this e-mail being shared with Habib but this was certainly not the case.....”*

23. The Claimant asked Mr Self to investigate “as a matter of urgency” (page 93).
24. Mr Self responded on 23 November 2020 agreeing that it was potentially a serious breach of confidentiality and committed to investigating fully, explaining that “we will take swift and firm action on what on the face of it would potentially be an act of Gross Misconduct. Please expect a request for you to provide a full statement providing some more detailed information at an investigatory meeting” (page 124).
25. Due to the covid measures in place at the time restricting travel, Mr Self asked the two most senior members of staff based at the Kegworth site, Mr Safder and Ms Hall, to take statements and send them to him. They started this exercise the same day.
26. Mr. Phillips provided a statement in which he said that he had heard the Claimant talking about an email implicating Mr Safder. The Claimant willingly showed it to him and agreed that he could take a photo and send it to Mr Safder. He also explained that the Claimant had been telling colleagues about the email in question (page 94).
27. Ms Price’s statement confirmed that the Claimant was talking about his case to Mr. Phillips and showed him his phone so he could read the email. She said Mr Phillips had asked the Claimant if he could take a copy so Mr Safder could see it, to which the Claimant agreed (page 95).
28. Ms Hall confirmed that it was not uncommon for the Claimant to discuss his case with members of staff and had discussed the contents of Mr Self's email with her. The Claimant had told her that he was in two minds about whether to tell Mr Safder himself. However, she did not witness the exchange between the Claimant and Mr Phillips (page 96).
29. On 24 November 2020 the Claimant provided his statement. He explained that Mr. Phillips had asked him to see the email and said:

*“I went to get my phone from the shunters room and opened up the mail and sat next to Dominic between him and Sarah on the front desk so he could read it. To start off with I was holding my phone and Dominic was reading it in his head from my hand, then Sarah asked me if I could move some trailers. I agreed and asked her to write me a list. At this point Dominic was still reading the email so I put the phone on the desk to allow him to finish reading the email and I got up and moved to the other side of Sarah ... Once I received my list of instructions from Sarah I turned around to get my phone back off Dominic, he had finished reading the email and it was on the desk, and it had locked at this point, Dominic said I can't believe that, that's really bad and I left the office....”*

30. The Claimant went on to explain that Mr. Phillips advised him the following day that he had told Mr Safder about the email and the Claimant was very angry with him (page 98).
31. A statement was also taken from Mr Page who said that the Claimant had approached him explaining that Mr. Phillips had sent the email to Mr Safder without his permission. The Claimant had asked Mr Page to send Mr Self an email to him "*setting the record straight*" (page 99).
32. The statements were sent to Mr Self and he observed that those given by Mr Phillips and Ms Hall, who is completely independent from the Respondent, explained a similar version of events differing considerably from what the Claimant had told him. They both confirmed that the Claimant had allowed Mr. Phillips to read the email and take a photo to show to Mr Safder.
33. He was also concerned that it had taken the Claimant two days to report his concerns.
34. Based on the statements, it appeared to Mr Self that Mr. Phillips had not done anything wrong and the Claimant had given him consent to read the email, take a picture of it and send it to Mr Safder. Mr Self believed that the Claimant panicked when he realised he might get into trouble for passing on information about his Tribunal claim around the workplace and/or that it would harm the claim. Accordingly, he fabricated his complaint and placed the blame on Mr. Phillips to avoid any repercussions.
35. Accordingly, Mr Self took the view that it was appropriate for the Claimant to be subject to disciplinary proceedings for breaching confidentiality and making a false allegation against a colleague in bad faith.
36. On 10 December 2020, the Claimant was suspended and invited to attend a disciplinary hearing on 14 December 2020 and advised that he had the right to be accompanied by a trade union representative or a colleague. The letter confirmed that "*the reason for this meeting is to address the company disciplinary action being taken against you in regards to your false accusation that another employee committed a serious breach of confidentiality about a private e-mail sent to you*" (page 101).
37. No further investigation was undertaken given that Mr Self had already investigated the matter.
38. The Claimant contacted his trade union and the local Citizens Advice Bureau to obtain advice, but neither organisation was able to assist him.
39. The Claimant's key contact at the Respondent during his suspension was Mr Safder. The Claimant asked him to contact two colleagues on his behalf to enquire if they were willing to accompany him at the hearing, but neither were. The Claimant also requested that his sister accompany him by way of an

adjustment to support him because he suffers from anxiety. However, the Respondent declined his request.

40. The disciplinary hearing was chaired by Mr David Mills, Financial Controller, and Mr Safder was present in the capacity of notetaker. At the outset, the Claimant said that he was disabled for the purposes of the Equality Act 2010 and wanted his sister to accompany him. Given that the Claimant had not previously mentioned having a disability or mental health issues, Mr Mills declined the Claimant's further request but, as a compromise, said that he could stop the hearing at any point and speak to his sister outside <sup>1</sup>.
41. During the hearing, Mr Mills asked the Claimant why there was a discrepancy between the version of events he described to Mr Self on 22 November 2020 and that described in his statement two days later. The Claimant acknowledged that the versions differed but was unable to provide a satisfactory explanation why.
42. The Claimant told Mr Mills that he felt that he was being targeted for bringing a claim in the Employment Tribunal. Mr Mills reassured him that was not the case and he was there to determine whether the Claimant had breached confidentiality and/or made a false accusation against a colleague in bad faith.
43. Mr Mills adjourned the hearing to deliberate. He was not satisfied that the Claimant had offered any reasonable explanation as to why he had provided two differing versions of events within two days. Mr Mills observed that although the Claimant had not admitted that he had given Mr Phillips consent to take the photo, both Mr Phillips and Ms Price confirmed that he had. In addition, Ms Halls' statement explained that the Claimant had said that he was minded to tell Mr Safder himself.
44. Mr Mills concluded that the Claimant was being untruthful and had raised a false allegation against Mr Phillips in bad faith as he was afraid of the repercussions of the e-mail being sent to Mr Safder. He further presumed that the Claimant "*believed that there would be some form of comeback for doing this and wanted to turn the tide in his favour*" (para 14 Mr Mills' statement).
45. Mr Mills took the view that there was insufficient evidence to find the Claimant guilty of breaching confidentiality and, therefore, did not consider this as part of his decision. However, given that the false accusation was singularly sufficient to amount to gross misconduct he took the decision to summarily dismiss him. Mr Mills' advised the Claimant of his decision at the reconvened disciplinary hearing and confirmed the outcome in writing the following day (page 115). The Claimant was not paid for his notice period.
46. The Claimant was advised of his right of appeal which he duly exercised, and an appeal hearing took place on 15 January 2021 chaired by Mr Jon Sparks, Managing Director. Mr Sparks considered the Claimant's grounds of appeal but ultimately decided to uphold the Claimant's summary dismissal.

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<sup>1</sup> NB the Claimant does bring a claim of disability discrimination.

47. The Claimant issued these proceedings on 12 March 2021 and in compliance with the case management orders provided a witness statement which explains:

*“I was on my shift on the 19th of November in the office with Dominic Phillips (Night Supervisor) and Sarah Price (Refresco team leader) when out of the blue, Dominic started to talk about the email communication... I started to question Dominic on how he was even aware of the email and its contents, given it was sent to me personally ... Dominic asked me if he could see the email. As he appeared to already know so much about the email, I did not see any problem or reason why he shouldn't read it. I did not have a printed hard copy of the email but it was on my mobile telephone, so I went to get my phone from the shunters room to show Dominic but before I was really able to show him or discuss the email, Sarah asked me to move a trailer so I placed my mobile telephone on the side and walked over to Sarah to go through the day's jobs . After Sarah had briefed me, I went back over to where my mobile was located assuming that Dominic had looked at the email and left the office..”*  
(paras 7, 8, 9 & 10)

## **The Law**

### ***Unfair dismissal***

48. Section s.104(1) (“ERA”) provides.

*“(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -*

*(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*

*(b) alleged that the employer had infringed a right of his which is a relevant statutory right .....*”

### ***Burden of proof***

49. Given that the Claimant lacks the requisite length of service to bring a claim for ordinary unfair dismissal, he has the burden of proving, on the balance of probabilities, that he was dismissed for asserting a statutory right. If he can establish a prima facie case that he was dismissed for asserting a statutory right, it is up to the Respondent to produce evidence to the contrary.

### ***Wrongful dismissal***

50. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the Order”) provides:



**“Extension of jurisdiction**

3. *Proceedings may be brought before an [employment] tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
  - (a) *the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
  - (b) *the claim is not one to which article 5 applies; and*
  - (c) *the claim arises or is outstanding on the termination of the employee’s employment.*

51. A claim for wrongful dismissal requires the Tribunal to consider whether the employee actually committed the acts referred to and breached the contract of employment.

**Conclusions**

***Wrongful dismissal***

52. We are required to determine if the Claimant was guilty of conduct so serious as to amount to a repudiatory breach of contract of employment entitling the Respondent to summarily terminate it.
53. The background to this claim is not in dispute – the Claimant issued a claim for unauthorised deductions from wages which the Respondent ultimately conceded was a valid claim in light of his contractual entitlement to paid breaks. During the course of the litigation, Mr Self e-mailed the Claimant on 16 November 2020 explaining the background to the introduction of paid breaks and that the Kegworth management team issued him with his contract in error and outside its authority. The implication was that Mr Safder was responsible for the error.
54. We have found as fact that the Claimant spoke freely about his Tribunal claim and told colleagues about Mr Self’s e-mail. Mr Phillips asked to see it to which the Claimant obliged and gave his consent for Mr Phillips to take a photo of it in the full knowledge that it would be sent to Mr Safder.
55. On reflection, the Claimant realised that he may find himself in trouble having allowed Mr Phillips to photograph and share the e-mail, so he made the decision to direct any blame onto Mr Phillips. He e-mailed Mr Self with an untruthful version of events, saying that Mr Phillips had taken the photo without his consent whilst he was distracted.

56. We are satisfied that the Claimant's account was untruthful for two reasons. Firstly, Mr Phillips' account of the incident is corroborated by Ms Price who was independent and had no reason to support Mr Phillips over the Claimant.
57. Secondly, the Claimant has given inconsistent accounts of what happened, two of which are recorded in contemporaneous documents. In his e-mail to Mr Self he accused Mr Phillips of looking at and photographing his phone whilst he was distracted. Two days later in his statement he said that he allowed Mr Phillips to read the e-mail whilst he held the phone and when he was called to assist Ms Price, he left Mr Phillips reading the e-mail and did not find out that Mr Phillips had taken the photo and sent it to Mr Safder until 20 November 2021.
58. The Claimant has also provided a further differing account in his witness statement for these proceedings in which he says he went to fetch his phone but before he '*was really able to show*' Mr Phillips the e-mail, he was called away and left his phone on the desk and assumed that Mr Phillips had read it.
59. The inconsistent accounts of what happened lead us to reach the same conclusion as the Respondent and we are satisfied that the Claimant lied about what had happened on 19 November 2020 and falsely accused Mr Phillips of a breach of confidentiality. This was done in bad faith because it was a deliberate act designed to deflect any potential blame away from the Claimant and onto Mr Phillips. Given that he deliberately lied, we are satisfied that he was guilty of gross misconduct by making an untrue allegation against Mr Phillips in bad faith.
60. Consequently, the Respondent was entitled to dismiss the Claimant summarily and he was not entitled to notice pay. His claim for wrongful dismissal therefore fails and is dismissed.

*Unfair dismissal*

61. The Claimant alleges that he was dismissed for asserting a statutory right pursuant to section 104 of the Employment Rights Act 1996.
62. As above, it is not in dispute that the Claimant issued proceedings in the Employment Tribunal. Given that the Claimant had a contractual entitlement to be paid for his breaks and the Respondent failed to pay him, we are satisfied that the claim was made in good faith. In any event, the Respondent does not assert that the claim was made in bad faith.
63. The question is, therefore, whether the Claimant's dismissal, or the principal reason for his dismissal, was because he had asserted a statutory right.
64. We note that the Claimant does not assert that the Respondent acted adversely towards him at any point prior to his dismissal - the case is predicated on his dismissal alone.

65. We are entirely satisfied that the Respondent invited the Claimant to attend a disciplinary hearing based on the statements it received following the Claimant's allegation against Mr Phillips. When the Claimant made the allegation, the Respondent investigated promptly. On examination of the statements, it was apparent that the Claimant had provided two different versions of events and Mr Phillips' statement was corroborated by Ms Price, who was an independent observer.
66. It was obvious at this stage that there was potentially a case to answer against the Claimant and not Mr Phillips. The Respondent suspended the Claimant and invited him to a disciplinary hearing at which he had the right to be accompanied. He was also provided with a copy of all the relevant documents in advance of the hearing.
67. At the disciplinary hearing itself, the Claimant was unable to give a satisfactory explanation for the differing accounts and Mr Mills reasonably concluded that he had lied in order to avoid any repercussions following sharing the e-mail.
68. Given the clear documentary evidence that the Claimant had made a false allegation against Mr Phillips, we are satisfied that the Claimant has not established a prima facie case that he was dismissed for asserting a statutory right. Regardless, we are entirely satisfied that the Respondent's decision to dismiss the Claimant was because of his gross misconduct in making a false allegation against Mr Phillips in bad faith, and not for any reason related to his Tribunal claim.
69. Mr Mills took a very measured approach to the case which is demonstrated by his approach to the allegation that the Claimant had breached confidentiality. He felt there was insufficient evidence to support the allegation so disregarded it from his deliberations.
70. During this hearing, the Claimant focussed on the procedure followed and the Respondent's refusal to allow him to have his sister present at the disciplinary hearing. However, our key consideration is the reason for the Claimant's dismissal and not whether the Claimant's dismissal fell within the range of reasonable responses as it would be in an ordinary unfair dismissal claim.
71. In any event, we are satisfied that the Respondent followed a fair procedure in dismissing the Claimant. He had notice of the hearing, all the relevant documents, the right to be accompanied and the right to appeal. Mr Safder was the notetaker at the first hearing, but we are satisfied that his role was contained to that. The Respondent is a small organisation with limited administrative resources operating in the covid pandemic and we see no evidence that he was involved in or influenced Mr Mills decision making.
72. In all respects, the Claimant was the author of his own misfortune. Had he not e-mailed Mr Self with a false allegation against Mr Phillips, he would not have been dismissed on 14 November 2020. It was the Claimant who asked Mr Self

to investigate promptly which he duly did and in consequence, the Claimant's gross misconduct came to light.

73. Given that we are satisfied that the reason for the Claimant's dismissal was his conduct and not because he had issued proceedings in the Employment Tribunal, his claim of automatically unfair dismissal fails and is dismissed.

**Employment Judge Victoria Butler**

Date: 5 January 2022

Sent to the parties on:

7 January 2022

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For the Tribunal:

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