zd

EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr N Grant		Shurgard Self Storage

Heard at: London Central **On**: 1 March 2017

Before: Employment Judge Goodman

Representation
For the Claimant: Miss T Barrett, Solicitor
For the Respondent: Mr C McDevitt, Counsel

JUDGMENT having been sent to the parties on 2 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This claim was brought both as an unfair dismissal claim and also disability discrimination, but at the start of today's hearing the Claimant withdrew the disability claim, and proceeded before Judge alone on the unfair dismissal claim only. It was not clear that the Claimant had been dismissed in circumstances where he purported to resign, and that has been the central focus of the Tribunal's reasoning.

Evidence

2. In order to decide the issue the Tribunal heard evidence from **Jamie Taylor**, Senior District Manager, responsible for the Respondent's three districts in London, from **Shani Davies** the HR Manager and from **Nicydorel Grant**, the Claimant. There was a small bundle of documents of around 80 pages. After the evidence was completed the parties agreed times and distances of various journeys by different modes of transport in London.

Findings of Fact

3. The Respondent's business is to provide premises for self-storage, and within London has three districts, each with eight or nine stores.

4. The Claimant started employment on 5 November 2012 as Assistant Store Manager at Kensington, which is in the North District. His summary contract of employment provided that his normal place of work was "Shurgard Store in the North District". It was stated in the contract itself: "your normal place of work is as stated at paragraph 17 of the summary but the company reserves the right to change this on a permanent basis upon one month's notice to you", and goes on to say that "due to the nature of the company's business you may be required to work at other places on a temporary basis as the company shall from time-to-time direct". In evidence, Mr Taylor held the view that a month's notice was not required if an employee was being required to move between stores within North District, because the Kensington and Gipsy Corner stores are in the North District.

5. The Claimant was promoted on 1 April 2015 to Store Manager, still at Kensington. It seems that he had good relations with Mr Taylor and was regarded as good at his job, at any rate, good enough to achieve promotion.

6. However, fairly soon afterwards, according to Mr Taylor, in June or July 2015 he began to impose action plans on the Claimant, because he considered that his performance was lacking. There is no evidence of any such plans being written down then. There is one such plan in the bundle dated from 14 September 2015, which names the Claimant as the store manager, but it appears to relate both to the store and to the manager. It set targets of 70% log-in rate to be achieved by 30 September, and an agent call pick Up rota 85%, and the break time of 40%, again by 30 September. There was space to mark in this plan to what extent these targets had been achieved, but the plan in the bundle has not been so marked. Mr Taylor says he did keep records of these, but he does not know where they are, and they have not been disclosed. There was reference to action plans, in the plural, so it is possible that there were a number of such plans, but they have not been disclosed.

7. Mr Taylor suggested that the Claimant continued not to be satisfactory, such that he decided that he was complacent in his job, and he should be moved. It is relevant background that while Mr Taylor was away, at the end of August or beginning of September, there was a visit from two very senior managers to the London stores, and their helicopter view overall was that there was room for improvement. In particular, it was Mr Taylor's view that there could be a higher occupancy rate, and greater profitability at Kensington could be achieved with better staff pick-up of telephone calls, and more effort to get customers to commit to storing their goods there. This points to there having been no written plans before the visit of senior managers. At some point, which is not clear, but before 7 January 2016, Mr Taylor decided that the Claimant should be moved to the store at Gypsy Corner, which is also in the North District. The store manager post had been vacant at least from September, because a document in the bundle shows that at that stage Mr Chris Piers was to be moved at Gypsy Corner in October, apparently for unsatisfactory performance. However, he did not move, and Mr Taylor's evidence was that this was because they were personal

reasons connected with his wife's health that led to the requirement being withdrawn. It is not clear what Mr Piers has done since, but he has had a period of compassionate leave.

8. On 7 January 2016 Mr Taylor visited the Claimant at the Kensington store and informed him that he was now to be moved to Gypsy Corner as store manager. It is understood that up until the Kensington store had continued to be staffed by two assistant managers. Mr Taylor timed the move for January because the least busy period for the business is between January and March of each year. The Claimant protested to Mr Taylor at the visit on 7 January that moving to Gypsy Corner would involve him in too much travelling time, given that he had the care of his mother. The Claimant's mother lived with him, she is said to be disabled by reason of osteoarthritis, Post Traumatic Stress Disorder and diabetes. It is not clear precisely what duties he undertook for her, but he mentioned in evidence that he would cook her a meal when he finished his shift, and he needed to be on hand to accompany her to hospital appointments, and to visit her from time to time. Mr Taylor says he had not known about the Claimant's mother until the meeting on 7 January. Mr Taylor concluded by asking the Claimant to think it over, and then on 8 January Mr Taylor emailed the Claimant with an instruction that he move to Gypsy Corner. It says:

> "As discussed yesterday you will be transferring store from Kensington to Gypsy Corner. This is due to the load of the business. The change will officially take effect from 1 February 2016 but will show on the rota of 18 January 2016 to allow preparation and the handover. Therefore you can claim lunch and targets bonuses from 18 January until 31 January.
>
> Regards Jamie".

9. The Claimant's response was a long email sent late in the evening of 8 January to Mr Taylor, copied to Ms Davies the HR Manager. He said that he would like to reiterate that he could not go to work in this store yet hoped we (he and the respondent) can reach an agreement if possible. He then said that he had been told he was transferring to meet the needs of business, yet felt it was because it had been felt that he was not the correct manager at Kensington store. He referred to past concerns he had expressed about being bullied and to action plans. Nonetheless he said:

> "At the end of the day there are higher management personnel who require certain criteria to be met and if they feel that this has not been the case than of course they can request that changes are made."

In the end it boiled down to expressed concerns about the action plans in an went on to say that it would cost an extra £1,400 to get to the store and he was already cycling to work to save money. However, that was not the reason for refusing to transfer. He said that was "due to my mother's health. I cannot work any further away from Kensington. In every interview I had with Georgina Beecham-Duncan I made it clear that I will be coming to Shurgard in Kensington to work as I would be close to her in an emergency". He then gave examples that he could cycle home in 20 minutes and be at local hospitals in 10 or 15 minutes. He pointed out that he

would have to leave earlier in the morning and arrive home later in the evening. He could work at Putney as an alternative, but had been told there was no vacancy for a store manager at Putney. He then proposed as a solution that if he was not the right man for the store manager at Kensington he could take a voluntary demotion to assistant store manager there, working with Ms Alexandra Packett-Peters, who was being moved back to Kensington to replace him as store manager. He stipulated that if he did so he should have a minimum salary of £18,000 per annum, that he could expect pay reviews and increases as usual, and he would not be made to move away from Kensington at least until 2018, that is two years on. He said then that:

> "I do however understand that you or Shurgard may not be willing to accommodate my requests and would still insist I go to Gypsy Corner as Store Manager. Therefore would ask that you then consider this my formal notice of resigning and my last date of employment with Shurgard to be Sunday 17 January 2016."

He said that he knew that he had to give more notice, but as he had not been given one month's notice of transfer he would not give them sufficient notice either. He concluded:

> "I feel deeply saddened to have to write this for it really does feel like I am not only being forced out of employment of an organisation I have come to love and enjoy working for but also feels I would be leaving on acrimonious circumstances. As mentioned earlier I do hope we can reach an agreement if possible."

10. That was sent to Mr Taylor, copied to Ms Davies, but at the time Ms Davies was busy filling a vacancy for store manager at Putney, and on the evening of 8 January 2016 Ms Davies sent an email to all UK stores saying that they had promoted Jared Bouaouni to a position in South district, which left a vacancy at the Putney store in West district, and that more updates would follow next week's internal store manager interviews for the West position. There were now two opportunities - Putney and Hanworth stores.

11. Next morning at 09.50 the Claimant emailed Ms Davies, copied to Mr Taylor, to say that he had seen the email advertising a sales position in the Putney store, and "as you may have seen I wrote an email to Jamie last night concerning a store move which mentions this and Kensington being ideal stores for me to work within. I would like to formally apply for the Putney SM vacancy."

12. The Claimant did not get an immediate reply for that. Ms Davies's evidence to the tribunal was that there was not in fact a vacancy for a store manager at Putney on 8 January. She had previously advertised for a store manager, but not to the Claimant, only within West District; she had shortlisted three applicants who would be interviewed on 12 January; she had not been able to trace an email advertising this post earlier than 8 January, despite a search of her archived emails.

13. On 9 January Mr Taylor spoke briefly to the Claimant by telephone, in response to his long email of 8 January. He did not mention the vacancy to him. Mr Taylor was by that date travelling in Europe and so not engaged with the Claimant's case.

14. Ms Davies was also busy, though in London, and arranged to telephone the Claimant the following Wednesday, 13 January. There was one call at 9.50 which ended with some acrimony, then a pause of about 5 minutes, then a further call. During that call Ms Davies picked up with the Claimant that he had said in his 8 January email that he was being bullied, and they discussed the action plans and his grievance about that. They then discussed the Putney vacancy. She informed the Claimant that it had been filled the previous day, that is 12 January. The Claimant has explained that this news was a considerable blow. Then the Claimant was told that the Respondent was not prepared to contemplate reducing him to assistant store manager at Kensington, even though the Claimant considered that he and Ms Packett-Peters would make a good team. They preferred to move him to another store to challenge him.

15. The respondent says that the instruction that he should be moved should come from the Vice-President for Europe.

16. There is dispute about whether the claimant told Ms Davies in this conversation that he was now resigning. The conversation became extremely acrimonious once more. Ms Davies says that the Claimant swore at her in terms that she was completely unused to. The Claimant denies this, and said that although he was angry and upset, at most he said that nobody gave a toss what the Respondent thought, and he did not use any more serious words or more directed to Ms Davies. Nevertheless, the conversation was such that it was terminated by Ms Davies without her going on to discuss, as she said she had intended, whether a flexible working arrangement would suit the Claimant's needs if he had to move to Gypsy Corner. In her view he became so abusive that she told him if he spoke like that he could receive disciplinary action.

17. The Claimant then left his keys and left the store. It was factually unclear whether he left all the keys at the time and walked out, or whether he felt unwell and, as he now says, split the keys so that he retained the important ones which had to be delivered to a more senior manager, but he did not return to the premises.

18. Later on 13 January Ms Davies wrote to the Claimant a letter which begins

> "Acceptance of Resignation
>
> We received your resignation verbally on 13 January 2016 which confirmed you would leaving with one week's notice and will not be working your notice period. This is in breach of your contract and was a goodwill gesture. We are willing to accept your request and can confirm your last working day with Shurgard is 20 January 2016. We will not be expecting you to work

> your notice. As requested please send in your written resignation as soon as possible and no later than 15 January."

The letter goes on to discuss payment arrangements, and is probably a template letter, and concludes by expressing sorrow that that he is leaving, thanking him for his commitment and wishing him the best for the future.

He was asked to return his uniform and keys to the Kensington store by Friday 15 January. There is no mention of disciplinary action for abusive language, nor to the detail of the Claimant's reasons for resignation.

19. On 19 February the Claimant lodged a grievance on a number of matters. First, he complained of an unfair application process for store manager posts, part of which referred back to the store manager post at Kensington in May 2014 when the Claimant had been unsuccessful, saying that it had not even been advertised or offered to him. Secondly, about the Putney post not being offered to him, and that management must have been aware of the Putney vacancy when receiving his 8 January email. Next he said there was disciplinary discrimination in respect of his responsibilities for his mother, and the details of this replicates what he had already said on 8 January. Then he said that he had been unfairly constructively dismissed, that he had refused the relocation because it is too far away because of the impact on his responsibilities for his mother. He referred to the conversations with Ms Davies on 13 January. He recited that she had been uninterested in his concerns, and of the requirement for him to move, she had said the respondent had a "1000 day rule", that no member of staff could remain in post for longer than that. Further, he had not resigned, he had only said he would if they could not meet his conditions.

20. In evidence the Tribunal learnt that this 1000 day rule is not a stated policy but that it had been expressed by a senior manager that all employees go stale and should not work in one place for more than thousand working days, so probably four years. It is however not said to be the reason for the Claimant's departure. The Claimant added that after speaking to Ms Davies the second time he had called Jamie Taylor to express concern about the way he had been treated, and he had not been interested and had only asked the Claimant to put it in writing, to which the Claimant responded that he had already sent an email dated 8 January. He said that this was a formal grievance.

21. The Claimant went to ACAS to commence early conciliation as a process on 2 March. A certificate was issued on 22 March.

22. Towards the end of March the Claimant received an offer of employment from elsewhere. There continues to be a loss of earnings, but he has been continuously employed since 25 April.

23. On 18 April 2016 he presented his claim.

24. As for the information presented by the parties after the evidence had been handed in, it seems to be agreed that the journey from the Claimant's home to Kensington took 26 minutes by bicycle, although in evidence the Claimant said

that on one occasion he did it in 19. Travelling to Wimbledon, his current journey to work by cycle is 32 minutes, and by tube is 23 minutes. Cycling from his home to Gipsy Corner is 35 minutes, and by tube 45 minutes. On cost, the Respondent maintains that in fact the journey to Gypsy Corner, which involves travelling from Fulham Broadway to North Acton, never leaves the Zone 2, so the cost would be more like £900 than £1,400. Thus the Respondent argues that the difference between the Claimant's cycle to work in Kensington, as against Gypsy Corner, was 9 minutes each way.

Relevant Law

25. Whether the Claimant's resignation should be treated as a dismissal is contained in section 95(1)(c) of the Employment Rights Act 1996, which says that an employee is dismissed by his employer if the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

26. Neither party referred in submissions to any case law. In a series of decided cases from **Western Excavating v Sharp** onwards it is made clear that entitlement to terminate without notice means that the employer must have been guilty of a fundamental breach of a term of the contract and that the Claimant has resigned in response to that breach.

27. One of the issues in this case is when the Claimant resigned, that is, on 8 January or 13 January. There is a case law on this too, although none of this has been cited by either party. In **Sovereign House Security Services Ltd -v-Savage1989 IRLR 115** the Court of Appeal reviewed earlier decisions and concluded that unambiguous words of resignation should be construed as resignation, but that if there was something in the context or the circumstances of the employee himself that would make the employer doubt whether there was a genuine resignation of employment the employer should explore that before accepting the resignation. One of the cases reviewed is **Southern v Franks and Charlesley and Co [1981] IRLR 278** about employees who act in the heat of the moment, where an employer ought to recognise this is not a considered decision**.**

28. An alternative view of what happened is that the Claimant in fact resigned subject to discussion of practicalities and conditions, as discussed on 8 January. It was to be recognised as a grievance, as he himself described it later, although he did not do so on 8 January. Had it been recognised by the employer as grievance, then, following the ACAS Code of Practice, proper practice would have been to call a meeting to discuss it.

29. The Claimant submitted that he was forced to resign by the decision to move him to Gypsy Corner, and that in in context this decision to move him and not consider travel or alternative posts was a breach of the implied term of mutual confidence and trust, which has been outlined in **Woods** and **Malik** as being where an employer "without reasonable or proper cause conducts itself in such a way as to evince an intention not to be bound by the contract". Other case law suggests (**Omilaju v Waltham Forest**) that where an employer is in breach successive actions may cumulatively amount to such a breach.

30. The Claimant argues alternatively that Respondent effectively is responsible for the dismissal by accepting the Claimant's purported and conditional resignation, not recognising that the 8 May reference to resignation was a grievance which should have been explored. This followed a breach of trust in the action plans, which were viewed by the Claimant as unmerited punishment in transferring him to Gypsy Corner. There was the short notice, when he should, it is said, have been given one month's notice of permanent change. There was no consideration of any alternative, those being put forward for the Putney vacancy, or the demotion. This contrasted with the treatment of Mr Piers, whose instruction to move to Gipsy Corner was withdrawn when he disclosed personal reasons for not doing so.

31. The Respondent argues that the Claimant's reasons crystallised on 8 January, when it was effectively stated that the reasons for leaving were not because he was given short notice, and could not have been because of the cost - not least because the proposal of demotion would result in greater loss to him than the increase in travel cost. Nor, they say, at this stage, was it lack of flexibility, which post-dates 8 January, nor was it a failure to explore the options, nor being punished for poor performance, because he admitted that the Respondent could do this. Nor, it was argued, could the additional distance rationally be a reason for refusing the move when this amounted to nine minutes twice a day. Further, when he wrote the email on 8 January, he was not aware that there was in fact a Putney vacancy, let alone he was not being considered for it.

Discussion

32. In the light of **Sovereign** it seems clear that it cannot be said that the resignation on 8 January was unambiguous. First, it was recognised by the Respondent that they needed some clarification, hence the arrangement to call him and discuss it on 13 January. Secondly, it was clear from the length of the email, and the terms in which it is expressed, that the Claimant was reluctant to leave Kensington, and proposed a number of alternatives to the move to Gypsy Corner, making it clear that resignation was the last resort because he considered that he could not move because of his mother's circumstances.

33. It also seems clear that he on 13 January because his conditions were not satisfied, and he was being required to move to Gypsy Corner without being considered for Putney or allowed to step down. Although it is disputed what was said in the call, and neither side has notes of the call, it is clear that it was very heated. Judging by their conduct afterwards it is hard to construe other than that the Claimant saw that he had been driven to resign. He did leave behind his keys, and he did not make it explicit then or in a text that only some of the keys had been left behind , and others to be delivered up on the Friday. His conversation with Mr Taylor that evening, when he said he did not need to confirm his decision in writing because he had already given it on 8 January suggests that this was what had happened (he had left all the keys, not intending to return). He had not had his conditions met, therefore he was to be treated as resigning as stated in that letter.

34. It falls to be considered whether he was resigning by reason of the Respondent's breach of a term of the contract, implied or otherwise.

35. The first point to tackle is the notice. Although the Claimant referred to needing one month's notice, as otherwise he would have given more notice himself, it seems reasonably clear from the summary that one month's notice of a move was only required if it was not within North District. So, while as a matter of contract he did not require one month's notice, what he may have objected to was being required to move so quickly. No evidence was before the Tribunal as to the necessity of moving quickly when the branch had been without a manager for some time. Nevertheless, of itself, it does not seem because of a breach of contract in respect of notice. The Claimant himself recognised that he could be moved to Gypsy Corner by the terms of the contract, although he objected to the punishment element of the action plans with which he had argued.

36. As to whether he could have been moved to Putney, this is unfortunate, and it is hard to know whether Ms Davies had in fact already, despite the terms of her 9 January email, advertised or accepted applications and was past the closing date and so could not consider him for Putney, or whether there was a degree of succession planning - alternative evidence given was that the plan for Putney was to promote an assistant store manager from within West District, so it was succession planning rather than a transfer within a district. It is quite possible that Mr Taylor being absent in Europe and Ms Davies with a very full diary and limited access to her computer, she had simply not considered moving him to Putney there and then, but just booked a meeting with the Claimant on the 13th. On these facts it is hard to say that there was a deliberate refusal by the Respondent to consider him for the Putney job; more likely it is simply unfortunate that clashes and circumstances meant that the Putney job was being filled at a time when the Claimant was looking for an alternative to Gipsy Corner, without considering the Claimant as an alternative.

37. Another question relating to a breach of contract is the question of grievance handling. There was a delay in responding to the Claimant's email of 8 January, when he was clearly agitated and upset. There is the fact that it was dealt with by a phone call, rather than by setting up a face-to-face meeting which could perhaps had been a better way to explore it. There was the acrimony of the conversation, such that Ms Davies issued a threat of disciplinary proceedings if she was further spoken to in this way. It was unfortunate that as a result of this acrimony Ms Davies did not proceed, as she has stated that she had intended to do to discuss whether there could be an alternative flexible working arrangement to accommodate the Claimant's care responsibilities. She has pointed out that flexible working was not formally requested, but that it was her intention to discuss it.

38. Can it be said that these breaches taken together, such that his conditions were not satisfied, amounted to a breach of the duty of trust and confidence such as to cause the Claimant to resign? Clearly there was a background of resentment at being made to move, apparently a punishment for not responding to action plans which he thought were unrealistic; the Tribunal is not in the position to judge the

quality of performance management, when there is so little detail available, or to know whether this was justified criticism; the Claimant referred to "plans", suggesting that despite the lack of documentation there was a review period, and the Claimant accepted and he was told he was not the right man for Kensington.

39. It is however not the primary cause of the Claimant's discontent, because whether performance concerns were justified or not he accepted the Respondent's right to remove him. He spoke of the costs of travel, but his demotion solution involved greater cost to himself than even the zone 2/zone 1 travel cost (which the Respondent in any event disputes).

40. Undoubtedly his perception of breach of trust and confidence is his own perception of the additional travel time, rather than the cost. His immediate conclusion was that it was too far to cycle at all and he would need to take the tube, and that this additional travel time would disrupt his care responsibilities. He had not worked out that this would involve at most 18 to 20 minutes per day, nor did he propose to solve it, perhaps by negotiating a cut in his hours or a shorter break, with the same pay.

41. What perhaps did cause him to resign was the poor handling of his protests and his request to discuss it. Mr Taylor appears not to have contemplated the Putney job for him because it was not an alternative in the district, which was why he told the Claimant on 7 January it was not available. He was then himself away and unable to assist. There was then the fact that Ms Davies could not move with any speed or arrange a face-to-face meeting so that there was an acrimonious call. There were no further discussions with the Claimant to address his concerns, nor was there any response to his termination grievance. It was simply accepted that he said that he would go if they could not meet his demands and he did.

42. The ultimate questions for the Tribunal are whether these breaches which led him to resign were sufficiently serious to amount to fundamental breach. The breaches on the part of the Respondent must be sufficiently serious to be a fundamental breach, because not every breach by the employer is so serious as to entitle an employee to terminate his contract without notice.

43. On the face of it the Respondent did address his concerns at some level through Ms Davies' call, and she did attempt to discuss it with him, even though the discussion deteriorated because of the Claimant's anger and anxiety. There was no satisfactory explanation of why the Putney job had apparently been available and now was not available, but on the evidence there probably were circumstances explaining this, and it was the timing that was unfortunate. The Respondent's view seems to have been that the Claimant was determined not to move from Kensington at any cost. They did not think that he was being in any way contemplating working at Gypsy Corner, which they deemed a reasonable management instruction.

44. Taking this as a whole, this was a reasonable management instruction that he move, even if performance grounds may not have been entirely justified, because they had the right by contract to move him, and did not do so capriciously.

The Claimant recognised that the Respondent had the right to move him for whatever reason. The Claimant's grounds for objecting boiled down to the additional travelling time, which he had not himself calculated, not being given the Putney post, and not being allowed to take a step down under a new store manager, not to the process of discussing his grievance. There was an attempt by the Respondent to meet him and address his concerns, but he was not open to discussion, and in the event walked away, leaving his keys.

45. The Tribunal concludes that while this is a matter which could have been handled better, and if had been handled more tactfully, the Claimant might have remained in employment, any less than ideal handling of his grievance and dissatisfaction was not a fundamental breach such as to amount to a dismissal when the claimant. The Claimant's own reason (travel time) was unfounded in fact, with additional travel time of 10 minutes each way, even in the context of a mother who needed some attention; he acted rashly when resigning rather that continuing to explore the issue. This was insufficient to justify terminating his employment and to claim that it was a dismissal on the part of the employer.

46. In consequence there was no dismissal, and the unfair dismissal claim fails.

Employment Judge Goodman
2 May 2017