RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Bouchafaa**

Respondent: **Mr Afzal & Mrs Aamir T/a Ian Howard Schoolwear (2015)**

Heard at: **East London Hearing Centre**

On: **26 & 27 April 2017**

Before: **Employment Judge Brewer**

Representation

Claimant: Mr S Hall (Solicitor)

Respondent: Mr T Perry (Counsel)

JUDGMENT having been sent to the parties on 17 May 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. This case was listed to be heard before me on 26 and 27 April 2017. Both parties were legally represented. I had an agreed bundle, witness statements and heard oral evidence from the Claimant and from Mr N Afzal, Mrs T Aamir and Ms L Hornibrook on behalf of the Respondent.

2. The Claimant claims unfair dismissal on the basis that, either that he was constructively dismissal or, in the alternative he was dismissed under Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Issues

3. The parties had agreed a list of issues as follows.

4. In relation to the claim under TUPE:

    4.1 Was there a substantial change to the claimant's working conditions?

4.2 If so, was the substantial change to the claimant's material detriment? Was the treatment of such a kind that a reasonable worker could or would take the view that in all the circumstances it was to his detriment?

4.3 Was the Claimant entitled to treat his contract of employment as terminated?

5 In relation to the constructive dismissal claim:

5.1 Was there a breach of contract by the Respondent? The Claimant relies on:

5.1.1 Being removed from his position as General Manager.

5.1.2 The removal of his duties.

5.1.3 The implied duty of trust and confidence (in respect of the above and his complaint about the above).

5.2 Was the breach sufficiently important to justify the Claimant resigning?

5.3 Did the Claimant resign in response to the breach?

5.4 Did the Claimant delay too long in terminating the contract in response to the breach?

6 In relation to unfair dismissal generally:

6.1 What was the reason for dismissal? Was the sole or principal reason for the dismissal the transfer?

6.2 Was the dismissal reasonable in all the circumstances?

7 In relation to these agreed issues I accept of course that this is what the parties agreed. I have assumed that issue 5.4 is essentially shorthand for 'did the Claimant affirm the contract such that he could not rely on that in founding a claim for constructive unfair dismissal'.

Law

8 I consider that the following law is applicable to this case.

TUPE

9 In relation to TUPE, there was no dispute that this was a case in which TUPE applied. TUPE provides enhanced protection against dismissal over and above general unfair dismissal law for employees with (at least) the qualifying period of service.

10 Resignations in response to a repudiatory breach of contract or to substantial changes in working conditions to the employee's material detriment are treated as deemed dismissals to which the enhanced protection against dismissal applies (regulation 4(9) and 4(11), TUPE).

11 Regulation 4(9) states:

> "Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer."

12 Regulation 4(11) states:

> "Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer."

13 Dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. If, however, the reason is an ETO reason (I have not gone into any detail in relation to ETO reasons as none was pleaded or relied upon in this case), then they will instead be potentially unfair (Regulation 7(1), TUPE).

14 I consider the following cases to be relevant.

15 **Tapere v South London and Maudsley NHS Trust UKEAT/0410/08** in which the EAT considered what is meant by the phrase "substantial change in working conditions to the material detriment of [the employee]". Ms Tapere was transferred from the Lewisham Primary Care Trust (where her place of work was stated to be in Camberwell) to the South London and Maudsley NHS Trust (which moved her place of work to Beckenham). Ms Tapere resigned and challenged the transfer of her place of work which she considered interfered with arrangements for her daughter's travel to and from school. The EAT held that:

> "Whether there had been a substantial change in working conditions was a question of fact to be determined by reference to the nature as well as the degree of change. Regulation 4(9) implemented the ECJ's decision in **Merckx and Neuhuys v Ford Motors Belgium SA [1996] IRLR 467**, which demonstrated that the character of the change was likely to be the most important aspect of determining whether the change was substantial. When salesmen were transferred to a new dealership at a different workplace without any guarantee as to client base or sales figures there was potential for an adverse impact on commission. Since these matters were all regarded as "working conditions" by the ECJ it followed that the phrase applies to contractual terms and conditions as well as physical conditions."

16 The inclusion of the adjective "material" in the requirement for a material detriment was a recognition of the finding in **Shamoon v Royal Ulster Constabulary [2003] IRLR 285** that use of the word "detriment", even without adjectival qualification, involved the issue of materiality. Its purpose was to emphasise that the trivial and fanciful cannot be accepted as a detriment. In **Tapere** (above) the EAT held that the impact of the proposed change had to be considered from the employee's point of view. In Ms Tapere's case, the change of workplace meant potential disruption to child-care arrangements and

a longer or altered journey which she did not wish to undertake. The question the tribunal should have asked was whether Ms Tapere regarded those factors as detrimental and, if so, whether that was a reasonable standpoint for her to have taken.

17 In **Abellio London Ltd (Formerly Travel London Ltd) v Musse and others [2012] IRLR 360**, bus drivers resigned and brought regulation 4(9) claims as a result of a relocation of six miles. The EAT held that, in London, a move from north to south of the river was substantial and an increase in the working day of between one to two hours was a material detriment. It was irrelevant that the contract contained a mobility clause; "working conditions" referred to an employee's actual circumstances, not what they could be contractually required to do.

18 In **Cetinsoy and others v London United Busways Ltd UKEAT 0042/14** bus drivers resigned and brought regulation 4(9) claims after they were relocated three and a half miles. The EAT upheld a tribunal's decision that this was not a substantial change to the employees' working conditions to their material detriment on the particular facts of the case.

19 Finally in **Donovan v JD Services HVAC Ltd and others ET/1102114/12**, an employment tribunal considered whether there had been a substantial change in an employee's working conditions where the employee was required to work for different clients than was the case prior to the transfer. The tribunal held that the employee's basic duties remained the same. Therefore, the fact that he now spent more time driving to clients and that the overtime requirements were more formalised than previously did not amount to a substantial change in his working conditions.

Constructive dismissal

20 In relation to the non-TUPE constructive dismissal claim, the following law is relevant.

21 The statutory definition is found in section 95(1)(c) of the **Employment Rights Act 1996** which provides:

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if) –
>
> (c) 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."

22 The following elements are needed to establish constructive dismissal:

22.1 Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, but must be sufficiently serious to justify the employee resigning.

22.2 An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.

22.3 The employee must not do any act indicating he has "waived" the breach and treated the contract as continuing (affirmation).

23 Constructive dismissal requires the employer to be in repudiatory breach of an express term or an implied term.

24 The implied term relied upon in this case is the implied term of mutual trust and confidence which was finally approved by the House of Lords in **Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation) [1998] AC 20** as follows:

> "The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee" (*per* Lord Steyn).

25 I pause to note, as many others before me that the words "calculated **and** likely to destroy...", as used in **Malik**, appeared to depart from the established formulation of "calculated **or** likely to destroy..." which was originally set out in the case of **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** and followed in many other cases.

26 The EAT has twice held that it was not Lord Steyn's intention in **Malik** to reformulate the test, and that the formulation in **Woods** remained good law (see **Baldwin v Brighton and Hove City Council, UKEAT/0240/06**, **Varma v North Cheshire Hospitals NHS Trust UKEAT/0178/07**). Therefore, if the employer's conduct is likely to destroy trust and confidence, the employee does not also have to show that their employer intended (or calculated) to destroy it.

27 In relation to the question of affirmation, the general principle is that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, then they will have waived their right to accept the repudiation.

28 Lord Denning said in **Western Excavating v Sharp** (above) held that:

> "the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

29 Affirmation of the contract may be express or implied. It will be implied if:

29.1 The innocent party calls on the guilty party for further performance of the contract, since their conduct is only consistent with the continued existence of the contractual obligation.

29.2 The innocent party themselves acts in a way which is only consistent with the continued existence of the contract - because such acts will normally show affirmation of the contract.

30 In **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443,** the EAT set out the principles that apply to affirmation in the employment context. It recognised that there is an important difference between employment contracts and most other contracts. It pointed out that if an employee faced with a repudiation by their employer goes to work the next day, they will, on the face of it, be doing an act which is only consistent with the continued existence of the contract, and therefore affirming the contract. Moreover, when they accept their next pay packet (which is further performance of the contract by their employer), the risk of being held to affirm the contract becomes even greater. If the ordinary principles of contract law were to apply strictly to a contract of employment, delay would invariably be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties.

31 The EAT recognised that the courts have been prepared to adopt a more flexible approach in employment cases. It referred to the Court of Appeal's decision in **Marriott v Oxford Co-operative Society [1970] 1 QB 186** as authority for the proposition that, provided the employee makes clear their objection to what is being done, they are not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time after the breach, even if their purpose is to enable them to find alternative work.

32 However, the Court of Appeal in **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121** said that tribunals could take a "reasonably robust" approach to affirmation, and that a wronged employee who failed to make their position clear at the outset could not ordinarily expect to continue with the contract for very long without losing the option of termination.

33 However, there will be cases where even significant delay is not fatal to a constructive dismissal claim. For example in **Chindove v William Morrisons Supermarket plc UKEAT/0201/13**, the EAT held that the fact an employee is on sick leave is relevant when determining whether a delay in resigning precluded a constructive dismissal, and in **Adjei-Frempong v Howard Frank Ltd UKEAT/0044/15** the employee had awaited further information from their employer (a written record of a meeting discussing performance issues at which he had only been partially present) before raising a grievance.

Findings of fact

34 I make the following findings of fact.

35 The Respondents run a business that sells schoolwear. It does this from a physical shop and on-line as well as going into schools and selling directly. For ease I shall in this judgment I refer to the business and Mr Afzal and Mrs Aamir together as the ‘Respondent’ and wherever necessary shall refer to individuals by name.

36 The Claimant was employed from July 2001 until he resigned with immediate effect on 4 October 2016.

37 Mr Afzal and Mrs Aamir purchased the Respondent business, the shop, on 17 February 2015. This was accepted to be a TUPE transfer. The previous owner and vendor was Howard Skolnick.

38 The Claimant was employed as one of two managers in the shop, the other being Rowan Clarke.

39 The Claimant's duties before the TUPE transfer were as follows (I note that not all of these duties were undertaken all of the time and they were shared by both managers):

39.1 Opening and closing

39.2 Responding to the shop alarm when Mr Skolnick was not available

39.3 Purchasing stock

39.4 Receiving deliveries

39.5 Sales and 'customer service'

39.6 Maintaining the web site

39.7 Stock-taking

39.8 Entering and correcting data on the stock system

39.9 Light cleaning

39.10 General shop work

39.11 Hiring and firing staff

39.12 Paying staff

39.13 Cash handling and banking

39.14 Selling directly to schools

39.15 On-line ordering

39.16 Staff rotas.

40 The Claimant's first complaint about changes to his role was not made until a year after the TUPE transfer.

41 In August 2016 Mr Afzal and Mrs Aamir decided to introduce a fairly casual uniform for their staff. This consisted of a T-shirt with 'Staff' on the back. The Claimant was required to wear this.

42 On or around 3 September 2016 the Claimant asked Mr Afzal and Mrs Aamir to confirm what his duties were.

43 The Claimant went off sick on 8 September 2016. He never returned to work.

44 On 9 September 2016 the Claimant wrote to Mr Afzal and Mrs Aamir to complain that they had not responded to his request for them to set out what his duties were.

45 On 22 September 2016 the Claimant raised a grievance.

46 The Respondent responded to the Claimant's letter of grievance on 23 September 2016.

47 The Claimant wrote to the Respondent again on 28 September 2016.

48 The Claimant resigned and his employment terminated on 4 October 2016.

Discussion

49 It is important to start with what the Respondent knew about the Claimant's job title and duties. Three documents are relevant to this: pages 34, 49 and 94 of the bundle. Page 34 is a list of duties that Mr Skolnick gave the Claimant but which the Claimant states he never read. It pre-dates pages 49 and 94.

50 Both pages 94 and 49 contradict to some degree, Page 34. There is no reference to the Claimant being a General Manager on page 34. Page 34 refers to the Claimant responding to alarms but makes no reference to that being 'when Mr Skolnick is not available' which appears elsewhere, there is no reference on page 34 to the Claimant purchasing 'consumables' and no reference to staff rotas. It is also clear that everyone did a number of the duties also undertaken by the Claimant, sales for example.

51 I mention these contradictions in the context of credibility. I am conscious that credibility is not all or nothing. Parts of an account may be credible, other parts may not be. In general I found both Mr Afzal and Mrs Aamir to be credible witnesses. They were clear and consistent; they accepted that some changes were made when they took over the business. I also found Ms Hornibrook to be credible. She had nothing to gain from giving evidence; she was clear and consistent in her evidence.

52 On the other hand I found some of the Claimant's evidence to not be credible. I cannot accept that he did not read such an important document as that which appears at page 34. In my judgment he awarded himself the title 'General Manager' and although I accept that Mr Skolnick confirms this (page 49), that document was specifically sought by the Claimant as part of his dispute with the new owners and was provided long after Mr Skolnick had sold the business. It is also contradicted by earlier documentation. There is no reference the Claimant as General Manager on either page 34 or page 94. Finally, as discussed further below, the Claimant has somewhat overstated his role in 'hiring and firing'.

53 From the evidence I heard it was clear that following the purchase of the business the new owners were more 'hands on' than the vendor had been. That is perhaps entirely understandable. The effect of this was that some things did change. The Claimant continued to purchase stock, but only after being asked to do so by the new owners. The web site was no longer maintained because it had been run through the vendor's computer, which was not part of the sale agreement. The Claimant was no longer required to write rotas, as no rotas were needed, all staff having been put on to fixed days. Finally, when the claimant returned from holiday in August 2016 he was not at that time

doing on-line delivery. However, I accept the explanation for that given by Mr Afzal. He said that as the Claimant had been away and certain changes had been made, and when the Claimant returned from holiday, during the business's busiest period of the year, it was simpler to leave that work to the people doing it and the proposal was that when the business was quieter the Claimant could take that work back.

54 Other changes were said by the Claimant to have been made to his duties. He said that he was no longer involved in hiring and firing. However, I find that there was no change to his duties as such. Again, accepting the evidence of Mrs Aamir, she said the Claimant told her about two casual staff who were available, she agreed and took them on. Thus the Claimant was involved in their recruitment. I also accept Mr Afzal's evidence, which was that previously, before the sale of the business, casual staff were generally friends of Mr Skolnick's daughter and known to him, whereas after the business was sold, casual staff tended to be people known to the new owners. The same system was in place and the Claimant's duty in this respect did not change, there simply was no need for him to recruit, which is not the same as saying he was no longer responsible for that.

55 The Claimant also referred to cash handling. The Claimant's evidence was that at the end of the day under the old regime, he cashed up – which amounted in essence to counting the money in the till. On his own evidence he continued to do this. What changed was that one or other of the owners would do a second count. I found this was not a change to the Claimant's duties; it was simply an extra check, an extra administrative layer.

56 The final change, which the Claimant referred to, was in relation to paying staff. The Claimant relied on a text from Mrs Aamir to the claimant which he says evidences that he was no longer responsible for paying staff. On any ordinary reading of this text this is not the proper construction of the wording and I unreservedly accept Mrs Aamir's evidence about this, which is entirely consistent with the text she sent. All that the text does is to query the amount of 1 payment to 1 employee made by the Claimant. It does no more than that, and is not evidence of a change in his duties. If it is anything, it is evidence of owners wishing to pro-actively manage their business.

57 Looking at the list of duties given by the Claimant which I have set out above at paragraph 39, and considering all of the evidence, I conclude in relation to each as follows:

57.1 The Claimant continued opening and closing

57.2 As to responding to the shop alarm when the key-holder was not available, The Claimant did not say this altered

57.3 The Claimant continued to purchase stock

57.4 The Claimant did not say that he no longer received deliveries

57.5 The Claimant continued to do sales and 'customer service'

57.6 The Claimant was not maintaining the web site but there was none to maintain

57.7 The Claimant continued to undertake stock-taking

57.8 The Claimant continued to enter and correct data on the stock system

57.9 The Claimant continued to undertake light cleaning

57.10 The Claimant undertook general shop work

57.11 The Claimant's duties in respect of the hiring and firing staff were not changed, it had simply not been necessary for him to exercise this duty by the time he resigned

57.12 The Claimant continued to pay staff albeit that one payment was queried

57.13 The Claimant continued to undertake cash handling and banking albeit that the owners also counted the cash

57.14 Selling directly to schools did not alter

57.15 On-line ordering did change but only temporarily because the Claimant went on holiday during the business's busiest period and it was less problematic to leave the arrangements in place which were put in place to cover his holiday, than to put the Claimant back on to on-line selling on his return from holiday

57.16 The Claimant's duty in relation to staff rotas did change, but simply because staff rotas were not being used.

58 Other than the issue of on-line sales, all of the above had been the position prior to the Claimant going on holiday in August 2016. The claimant therefore knew about any changes when he asked for holiday, when he required the employer to perform their part of the employment contract (alongside continuously paying him, providing him with work and in all respects maintaining the employment relationship) and therefore I would add that even if there were any breaches of contract before August 2016 the Claimant is in some difficulty relying on them because he continued to work normally, he did not work under protest, he took his pay and he acted, and he required his employers to act in all respects in accordance with his employment relationship and contract. In short, he affirmed the contract.

59 The Claimant also refers to two other matters which post-date his return from holiday: first the Respondent failing to deal with his grievance as part of, or possibly in isolation, as a breach of the implied term of trust and confidence. Second, having to wear a T-shirt with the word 'staff' on it.

60 Turning then to the grievance, in my judgment the way the Claimant put his case put the Respondent in an impossible position. The Claimant says the grievance was not dealt with, he was essentially ignored. The Respondent says the Claimant was off sick with stress at the time he raised his grievance so although the Respondent could have, for example, offered to meet the Claimant, and it is accepted that they did not, their reason was benign. They opted for a hands off approach because of the Claimant's stress.

61 Having said that I should add that the Respondent did not in fact ignore the grievance.

62 In their email in response to the grievance letter, the Respondent asks the Claimant how he would wish to proceed (see page 62). As a minimum this was maintaining the dialogue. It is far from ignoring the Claimant. In my judgment this is a very long way from a breach of contract either in itself or as contributing to a breach of the implied term of trust and confidence.

63 As to the issue of the T-shirt, as a matter of fact the Claimant was a member of staff and it is difficult to see what he objected to, and he was not able to explain it. I do not consider this came close to a breach of contract. It was a trivial matter.

64 In his resignation letter the Claimant nails his colours to the mast. He resigns he says, because, in his words, "you have completely changed my job role and responsibilities". But on any objective analysis of what occurred that was far from the case. The vast majority of the Claimant's duties were the same, two were no longer required at all (web site/rotas) and some were supplemented by the new owners (cash counting/stock purchase).

65 None of the changes amounted either separately or together to a repudiatory breach of contract. Even if they did, which they did not, I find that as at August 2016 the Claimant affirmed the contract for the reasons set out above, and the handling of the grievance and the T-shirt issues either separately or together did not amount to a repudiatory breach of contract.

66 Given the above finding I do not need to consider the issue of whether the Claimant resigned in response to a repudiatory breach of contract. There was no repudiatory breach.

67 In short, in relation to the Regulation 4(9) claim, looking at the nature, degree and characteristics of the changes that were made, I find that it was not reasonable for the Claimant to conclude that these were substantial changes nor that they were to his material detriment.

68 Given the above, the claim for unfair dismissal, whether constructive, under regulation 4(9) or otherwise fails.

Employment Judge M Brewer

29 June 2017