



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Pease

Respondent: A Buckler (Haulage) Limited

Heard at: Middlesbrough **On:** 25 May 2017

Before: Employment Judge JM Wade

Representation

Claimant: Mr D Robinson-Young (Counsel)

Respondent: Mrs J Dalzell (Solicitor)

Note: The written reasons provided below, subject to editorial changes for clarity of expression, were provided orally in an extempore Judgment delivered 25 May 2017, the written record of which was sent to the parties on 2 June 2017. A written request for written reasons was received from the claimant on 2 June 2017. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 25 May 2017 are repeated below:

JUDGMENT

The claimant's complaint of constructive unfair dismissal is not well founded and does not succeed.

REASONS

Introduction, issues, and evidence

- 1 This is the judgment of the Employment Tribunal, Employment Judge J M Wade sitting in Middlesbrough on 25 May 2017 in Mrs Pease's case against A Buckler (Haulage) Limited, number 2501316/2016. This is a constructive dismissal case.
- 2 It has as part of its background a "red mist" incident on 10 June. It does not do anybody credit with the exception perhaps of Mr Baldwin and Richard Love. It is an inescapable part of the background to this case so I have made some very brief findings about it.

- 3 The single issue, however, that the claimant pursues is whether the respondent conducted itself without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage trust and confidence by its failure to produce a grievance outcome or address her grievance, in response to which she resigned.
- 4 The evidence that I have heard yesterday and today has included: a small bundle of documents which has been helpful; CCTV evidence of the incident on 10 June both from the respondent's five cameras and from an unidentified source that was made available to the claimant; oral evidence from Mrs Pease, Mr Pease, Mr Mark Love, a director of the respondent company, his son Richard Love, and Mr Baldwin who was and is an employee of the respondent.
- 5 I want to say a word about the reliability of the oral evidence that I have heard over the last two days. It is certainly the case that in the heat of the moment people have adrenalin running, they have anger descending and often they are not necessarily reliable in their recollections, particularly those very much engaged in this sort of altercation. For that reason CCTV can be very helpful, but, when there are allegations of verbal abuse and exchanges, as there are in this case, clearly CCTV is of limited help to me in making those findings about what was said, or not.
- 6 I have checked my notes of cross examination very carefully. My assessment based on those notes is that Richard Love and Mr Baldwin can be safely relied upon; otherwise, on the critical matters I have to weigh up all the evidence: to this Tribunal orally and in witness statements; the contemporaneous reports including the police report; and other contemporaneous material. I have to decide in the round decide whether what is asserted is more likely or less likely to have happened.
- 7 It is significant in my judgment that the claimant did not include in her grievance or in her statement the full context for the two allegations that she made against Mark Love, namely calling her a "shit head" and pushing her, but instead there was a very brief account of what even Mr Pease thought it fair to call an altercation, in which both men were given a police information notice concerning harassment. The police of course had viewed CCTV. There was no hint of that context in the claimant's grievance or claim form.
- 8 Another person from whom it would have been helpful to me to have heard, would, of course, have been the elephant in the room, Martin Love, a former director and brother of Mark Love, because he has clearly played a large part in the chain of events about which I have heard. Neither of the parties saw fit to have him ordered to attend or otherwise be available to me.

Findings of fact

- 9 The claimant worked for the respondent from 2 November 1998. The respondent is a family firm of contractors in the construction trade, it employs about 30 people. It was started by Mark Love's father. His younger brother "Martin", was also a shareholder at the material times.

- 10 There was a falling out in 2012 and since that time Martin has not attended the office or carried out any work there. The company did not give staff written contracts of employment, nor did it have a written grievance or disciplinary procedure in place, but it took advice as and when necessary.
- 11 The claimant ran the payroll every month. Sammy Love, Martin's daughter, also worked in the business for a while. She was a good friend to the claimant, they exchanged presents, they met for lunch. She had not attended work since December 2014. Her father Martin had authorised a substantial pay rise for her at some point to more than double that of the claimant's wages.
- 12 The shareholder dispute was due to be resolved in 2016. The claimant provided a short witness statement in March about the involvement of Martin in the family business for the purposes of that dispute. She was shortly to go on leave for serious surgery. Mark Love thought that she had not been as helpful in her statement as she could have been. Meanwhile, she signed the statement but then asked if her husband could collect a copy because she remembered that there was something about quotations for stone and the like, done by Martin, which she wished to include. It was the case that Martin had had some ongoing involvement of some description in the recycling and stone yard operated by the respondent, but not its main business. Richard Love had said "yes" to the provision of the copy statement.
- 13 On 4 March the claimant's husband attended the respondent to collect that statement. Unfortunately Richard Love was not there. The statement could not be found. There was a discussion. Mark Love was there. There was said to be no difficulty in providing the statement via e-mail – that assurance was eventually provided - but nonetheless Mark Love did not like Mr Pease's attitude and asked him not to come into the office again. Prior to that there had been no difficulties at all in the relationships between Mr Pease and Mark Love.
- 14 While the claimant was on leave Harvey Love, another brother, undertook the payroll for the business. He brought to Richard's attention that he thought there were unexplained pay rises for the claimant revealed by the pay records. That was not raised with her at all, and she was paid her full salary in March and April while on sick leave.
- 15 Mark Love was asked about the claimant's pay and he told Richard that he did not authorise pay rises. Advice was sought and it was followed. It was to the effect that it was too late to raise those matters: all that would be said was that the sleeping shareholder, Martin, had approved those pay rises.
- 16 Also whilst the claimant was away on sick leave, the company received a letter from Sintons, a firm of solicitors acting for Martin in the shareholder dispute, to say witnesses had been bullied or words to that effect into giving statements. The claimant was not the source of that complaint, but Mark Love thought that she was.

- 17 When she returned from leave on 3 May, Mark barely spoke to the claimant, but otherwise the business functioned as usual. When she asked Richard about the atmosphere he explained about the Sintons' letter. She said it was not her and it was left at that. Mark Love's resentment of the claimant was by this stage twofold: the pay rise issue which could not be pursued; and the feeling that she was loyal to Martin and not him.
- 18 On 10 June Mr Pease attended work at the end of the day to bring in some clothing for the claimant and to pick her up. He worked nearby and he typically attended when he finished work, whatever time that happened to be.
- 19 When Mr Pease came into the office Mark Love asked him to leave, saying he had not liked his attitude in March. There then followed an altercation in which there were angry and threatening words exchanged, with Mr Pease and Mark Love effectively fronting up to each other. Richard Love tried to calm things down, with Mrs Pease at one stage standing in front of her husband to prevent him getting in contact with Mr Love, and with Richard trying to calm his father. The altercation went outside.
- 20 By that stage Mr Pease wanted Mr Love to come into the yard and to sort things out. Mark Love was in the doorway of the office and the claimant sought to calm things by taking his arm. He reacted to that by shaking her off. At some later point when Mark Love was coming out from the toilet inside, while the claimant was going back to get her things, she said to him "You're a fucking cunt", more than once, and he responded with "And you're a shithead". As I said none of these events put any of the parties in a particularly good light.
- 21 Eventually Mr and Mrs Pease left. Mrs Pease said "I'm not coming back and you'll be getting another fucking claim". She very well knew about claims from previous employees, including her good friend Martin's daughter.
- 22 On 11 June the claimant obtained a fit note certifying absence for two weeks for stress at work. Subsequently there were similar sick notes but for greater lengths of time.
- 23 On 14 June Mr Love wrote to the claimant saying it was clear she had resigned, but could she please clarify. She then said in writing that she had meant when she was not coming back that she was not coming back because it was the weekend, and would be an employee until told otherwise.
- 24 Richard Love then wrote to say that the 10 June incident would be investigated as a disciplinary matter. Nothing in fact was done about that. The claimant sought advice and then submitted a grievance alleging a push by Mr Mark Love and being called a shithead; she also complained that Richard Love had not intervened on her behalf; she made no reference to her own conduct.
- 25 That grievance was not e-mailed to the company e-mail address which was well known to everyone, but instead to Martin Love. The claimant knew that Mark and Martin were only communicating through solicitors.

- 26 Martin Love then arranged a meeting with the claimant after she chased him by email a couple of times. He arranged that meeting for 11 July at accountancy offices known to him. An accountant was present and took some notes. That meeting lasted about half an hour. The claimant was asked to explain what had happened and what she wanted as an outcome to her grievance, which she did, and Martin said that he would let her know. He was also working to a script of what was to happen at that meeting, and he had taken advice about how to deal with it. He had relayed that advice in a reasonably long letter to the claimant before the meeting.
- 27 Martin did not provide a copy of the grievance to solicitors acting for Mark Love or for the company. In essence Martin kept the existence of that grievance from Mark Love, from Richard Love and from their advisers until after a mediation of the shareholder dispute, which took place on 19 September, or around 19 September, and as a result of which he ceased to be a director.
- 28 He e-mailed the claimant on the afternoon of Monday, 19 September to say this:
- “Good afternoon Carolyn, I would like to inform you that as of today I am no longer a director of A Buckler (Haulage) Limited. I forwarded your e-mail of 15/9/16 for the attention of Mark Love on the same day. I sent it twice so as to make sure it got there. I wish you a quick and speedy outcome. Best regards Martin Love”.
- 29 As I have said I have not heard from Mr Martin Love. I am very reluctant to make findings about matters on which he has not had the opportunity to comment. Nevertheless on the evidence that I have heard, that is the oral evidence of Mark Love who says he “does not do e-mails”, and Richard Love who has told me about the company e-mail account, I have accepted that Martin did not copy that e-mail to the normal company e-mail address, and/or that it did not find its way to either Mark or Richard, notwithstanding that he said in his e-mail to Mrs Pease that he had done so.
- 30 Neither Richard Love nor Mark Love had any knowledge of the claimant’s grievance about the altercation, except for a call from lawyers to say that they had been approached by other lawyers, to say that there was a grievance; and a copy was then sought on the company’s behalf, but was not forwarded.
- 31 These circumstances are almost a perfect storm of ignorance such that when the claimant made further queries of the respondent in September about pay deductions, and Richard Love came to deal with those, his belief was that the grievance she mentioned concerned the pay issues. That was his genuine belief.
- 32 He then sought to resolve that pay grievance, but it was reasonably lengthy and complicated to do so and by 5 October the claimant had cause to send a reminder about dealing with “her grievance”. Again she did not specify what the grievance was about, or distinguish it in any way from her complaint about pay. That was in spite of the claimant having approached solicitors about the incident on 10 June.

- 33 She had also approached ACAS about the issues with pay but she did not say to Richard at any point that there were two issues going on at the same time, or otherwise put him straight about matters.
- 34 The claimant then said rather disingenuously in a letter that this was the tenth reminder that she was sending about her grievance, which was of some surprise to Richard. She said that she would like a reply by 14 October. He did not reply, because he was working on resolving the money issues concerning savings and deductions, and that was what he believed her to be chasing. He was also doing his day job of course. As a result of his failure to reply the claimant resigned with immediate effect on 20 October 2016.
- 35 The claimant relied in her resignation letter both on the failure to resolve the grievance, and also on the failures in connection with alleged deductions and work savings; the latter were not pursued as grounds of a breach of trust and confidence these proceedings.

The Law

- 36 As to the law sections 94 and 95 of the Employment Rights Act 1996 provide as follows:

94 The right

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

95 Circumstances in which an employee is dismissed

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

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
- [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
- (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.

- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--

- (a) the employer gives notice to the employee to terminate his contract of employment, and
- (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

- 37 I have also been referred to four cases:
Atkinson v Community Gateway Association UKEAT/0457/12;
Sawar v SKF Limited UKEAT/0355/09;
Derby City Council v Marshall [1979] ICR 731;
Western Excavating v Sharp – which is well known to the advisers here.

Discussion and Conclusion

- 38 I have to apply the common law test, that is, did the respondent conduct itself without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage trust and confidence? The matters relied upon, as I have indicated were limited to the conduct of the company in not resolving the grievance. The company, of course, is all the proper officers and managers of that company who act or make decisions on its behalf.
- 39 In this case what was done to resolve the grievance was that Martin Love took some advice on behalf of the company and he sought to address the matters in the meeting with the claimant. He learned that the claimant wanted an apology, and indeed she had set that out in her letter. She wanted was an apology, and an assurance that matters would not be repeated. What Martin did not do, or collect at any stage, was the account of the others present on 10 June. He did not approach any witnesses. He did not approach Richard Love or Mark Love. We do not know whether he took any other steps at all other than undertaking that meeting.
- 40 Similarly he did not pass on matters as he should have done. He did not pass them on through his solicitors; he did not seek to take his investigations any further through a review and discussion of CCTV. How could that happen when in reality he was not speaking to his brother or to his nephew who were running the respondent.
- Did the respondent engage in conduct calculated or likely to destroy or seriously damage trust and confidence (“cross the Malik threshold”)?
- 41 On any ordinary analysis a company, even a small company such as this one, would objectively be likely to seriously damage trust and confidence if it failed to investigate and provide an outcome to a grievance.
- 42 These findings however, are extraordinary, in my experience and this chain of events is extraordinary. Trust and confidence was already very damaged, if not destroyed by the events of 10 June and the claimant had indicated at the time that she was ending her employment: that is what she meant when she said “I’m leaving, I’m not coming back, and you’ll get another f...king claim”.
- 43 The respondent permitted the claimant to retract that resignation because it was made in the heat of the moment and it did so perhaps very fairly. It then went on to pay statutory sick pay during the periods for which the claimant was certified sick and it proceeded to deal with the money matters about holiday pay and other matters that she

raised. These were all matters within Richard's knowledge to which he attended reasonably and which was conduct likely to assist in restoring trust. That may be one reason why the claimant did not rely on the events on 10 June as amounting to a breach of trust and confidence: she effectively waived those matters.

- 44 At the time that the claimant sent her tenth reminder about the 10 June events grievance, on 5 October, she had submitted a further sick note for a longer period of time, of some six weeks or so. Her resignation came midway through that last period of certified sickness absence.
- 45 I have also taken into account that ordinarily where a respondent has failed to provide a grievance outcome, and that respondent has no written grievance procedure or contracts of employment, those matters would make it more likely that the Malik threshold would be crossed. But, the claimant had been the office manager for 19 years. She knew very well how things worked in this small business and she knew very well about the dysfunction between the two owners, Martin and Mark.
- 46 Albeit her complaint was about Mark, and to a very limited extent Richard, and in complaining to Martin she may have felt that was the reasonable and correct approach, she gave no hint of the circumstances in her subsequent chasing of Richard. Further she only went to Richard after Martin said he could no longer help. This was in the context of her knowledge of the dysfunction and that there had been absolute trust in this small company prior to these events. The claimant knew and understood the circumstances and could, at the very least, have copied in Richard or made him aware in very clear terms of the existence of the previous grievance and its handling by Martin, without betraying its precise subject matter. After all, she was content to raise pay and other matters with Richard.
- 47 The claimant could have said, "I've complained to Martin, he's had a meeting with me, he hasn't resolved it and I've sent some chasing e-mails. You now need to look at it". But she didn't. Her communications were less than clear. On balance I have drawn the inference that there was a game being played here, by, at the very least Martin, and possibly the claimant, which has impacted on the circumstances in which the respondent company's conduct comes to be assessed.
- 48 I have to ask myself whether a delay in responding to a final chasing e-mail of 5 October was conduct calculated or likely to seriously damage trust and confidence or destroy it. Certainly on my findings I have concluded that that was not the intention, but was it objectively likely to do so?
- 49 The fact that Richard Love did not acknowledge the 5 October email before the claimant's resignation, and that had he done so it might have prevented the resignation, against the chain of events above cannot be said to be in repudiatory breach, or conduct crossing the Malik threshold, given the knowledge of the claimant of the dysfunction at the time and the very extraordinary chain of events that has occurred in this matter.

Did the respondent have reasonable and proper cause for its conduct?

- 50 For completeness, I also ask did the respondent have reasonable and proper cause for its failure to provide a conclusion to the claimant's grievance. There were two reasons. The reasonable belief in Richard's mind as to the grievance that was being chased: he believed it was the one about savings and was taking time to work that through; and the other reason of course was that Richard and Mark did not know about the grievance which had been lodged with Martin. Were those reasons, reasonable and proper cause?
- 51 The lack of knowledge was against requests to Martin's solicitors that any grievance be disclosed, and also how long it was since it had been raised, and what it was about. Richard did not know those matters and reasonably so given the claimant's communications. Even if the conduct crossed the threshold, there was reasonable and proper cause for it in my judgment.
- 52 For all these reasons the claimant has not proven repudiatory conduct by the respondent in response to which she resigned. She has not proven a dismissal and for that reason her complaint of constructive unfair dismissal is not well founded.

Employment Judge JM Wade

Date: 29 June 2017

**REASONS SENT TO THE PARTIES ON
29 June 2017**

G Palmer

FOR THE TRIBUNAL OFFICE