Case No: 2207101/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr. C. Chappell**

Respondents: **Interserve Security (First) Ltd**

Heard at: **London Central** **On:** **28 January 2018**
Before: **Employment Judge Goodman**

Representation
Claimant: **in person**
Respondent: **Mr. S. Roberts, counsel**

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the claimant.

2. Remedy will be decided at a further hearing.

REASONS

1. The claimant resigned his employment with the respondent by letter of 31 July 2017, and on 8 September 2017 presented a claim to the Employment Tribunal that he had been unfairly dismissed.

2. The Tribunal has heard evidence from the claimant, Christopher Chappell, and from Paul Lotter, the respondent's London Security Operations Manager. There was a small bundle of documents.

3. After hearing oral submissions, judgment was reserved.

Findings of Fact

4. The respondent supplies security guards to customers such as banks, insurance companies and law firms.

5. The claimant had been employed from 21 November 2012. In August 2016 he volunteered to provide cover for an absent Resource Manager. Until then the claimant had worked night shifts. The transfer to day work meant his

basic rate was less, without the opportunity to earn overtime, and his childcare costs increased, and it was agreed that he could work from home part of the week to reduce his costs. The temporary cover position continued through the autumn, and in January 2017 he was appointed to the post on a permanent basis. From then he was paid the Resource Manager rate for the job. Although the claimant was told that they would have to review the work from home arrangement at some point, no steps were taken to revise this arrangement.

6. The workload was heavy. In December 2016 there was an incident of rudeness to a colleague which was investigated but not pursued. It was recognised that the claimant was under stress.

7. The chief source of stress was arranging cover for employee holiday and sickness, which often occurred at very short notice, and the pool of employees available to work at short notice was limited. Each Resource Manager had his own pool, sometimes they might lend members of the pool to the other 3 Resource Managers.

8. In March 2017 there was an incident when he put the phone down on a customer. He was given a verbal warning.

9. The respondent was successful in gaining extra contracts, one with client A and another with client W. The respondent recognised that it needed to recruit more staff to cover these, and took on a recruitment agency for this purpose.

10. In the meantime, the workload continued to be heavy, and now to increase. In April there were so few managers on site for client W that when the client complained about it, the claimant volunteered to work additional weekend and night shifts there, 13 in all. He took a day off sick, because he had been awake at night worrying, immediately before working one of these shifts.

11. The claimant's evidence is that while in March all the Resource Managers had to cover 12,500 to 14,000 security man-hours per week each, by June the hours he had to cover had risen to 20,000. The Respondent does not disagree with the figures but suggested that the contracts allocated to the claimant in addition were "self managed", meaning that the client by and large covered for holiday, so lessening the load for the Resource Manager, or that he did not have the wide geographic spread of other Resource Managers, who therefore had to spend much time on the road. The Tribunal was not able to test this suggestion.

12. After what he called a "month from hell", towards the middle of May the claimant raised the issue of his high and unequal workload. He prepared spreadsheets for most locations and contracts, and was hoping to discuss it with the senior manager Hakim, only to be told that the meeting was not going ahead because Hakim had not prepared for it.

13. On 2 June the claimant emailed his immediate manager Krasimir, copied to his manager, Paul Lotter, asking "can we please go through the site" as his weekly hours had increased to 20,000 a week. After much technical material on sites and contracts he concluded: "can I please ask for this to be

addressed ASAP as the workload which is already completely out of proportion with the rest of the RM team as it is starting to affect my morale".

14. Paul Lotter told the claimant that he would get Krasimir to discuss it with him, and added: "we need to look at the whole resource team, and how it works as we know changes need to be made. Please try and bear with us".

15. On 30 June the claimant went on 8 days annual leave, having worked hard to minimise the cover would be required from other Resource Managers in his absence.

16. On his return to work on 22 June, not long after he arrived for work around 6 AM, he got a call from home to say that his school-age daughter had suffered fits and was being taken to hospital. He went home as an emergency, leaving a message as he did. The respondent was sympathetic, and he was paid for his subsequent absence.

17. On the morning of Thursday 27June 2017 the claimant sent an email to his managers, saying:

> " it is with regret that I need to advise you that I am unable to continue my position in its current form",

because the current childminder was not able to look after his daughter if she had a seizure and,

> "unfortunately this has left us in the position that until we find someone suitable"

they would not have daycare and

> "I am happy to continue until either a replacement is found or sites are relocated in the RMs, but this would be working predominantly from home".

He could not say how long this would be, but an agency had recommended someone who could start on 24 July, and they would be meeting her on Saturday (1 July). He went on:

> "I would also be happy to stay with the company work Friday Saturday and Sunday nights… Either resourcing or in the PCC until my situation changes if you feel this is of benefit to the company".

He would be in the office first thing next day, as his wife was covering.

18. Mr Lotter says that his reading of this email was that the claimant was resigning, and he needed to recruit a replacement. He called the recruitment agency.

19. The claimant came in and worked Thursday and Friday; Mr Lotter was away on the Friday. There was a short conversation with the claimant on 28 June, when he expressed sympathy for his situation, and discussed his proposal to work weekend nights.

20. In addition, Mr Lotter explained to the claimant that there was a restructure meeting later that day, which he could not attend because he was to go home to collect his child, in the absence of the childminder. The claimant had not received an invitation to this meeting, as other Resource Managers had. Mr Lotter told the tribunal this was an error, but the claimant did not know that, and on noting that the email inviting Resource Managers the meeting had been sent only one and a half hours after he had emailed the day before, formed the belief that the respondent had already decided that he was no longer a Resource Manager and so did not need to be consulted about restructure. Mr Lotter explained to the claimant that the main topic of the meeting was going to be the requirement that all Resource Managers work Monday to Friday 7 AM to 4 PM, with no late starts or early finishes, and no working from home.

21. On the evening of Sunday, 2 July the claimant emailed his managers from home to say that having met the childminder, he could confirm that he could now commit to working 7 AM to 4 PM Monday to Friday as the RM contract required from Monday 24 July on a permanent basis. Until 24 July he would come to the office as much as possible, and would update by 12 noon each Friday. This week he would be working Monday, Wednesday and Friday 6:15 AM to 1 PM. He concluded that he hoped this:

> "helps alleviate any worries about my commitment to the position and also additional pressure I would have added to the team by not being available, that said in the short to medium term I will be actively looking to progress to the next level… Is not only do I believe that I have proved that I can work in a pressure environment and get good results, I have also shown that I can take critique and advice on board and improve with it".

22. When he came into work on Monday, 3 July the claimant was asked to see Paul Lotter, who told him that having resigned from his role, they had not envisaged that he would be part of the team as restructured, and had already started to recruit a replacement. The restructured team was to replace the four Resource Managers with 2 people working Monday to Friday 7 AM to 4 PM, to be called Senior Resource Manager and Lead Scheduler, and two Schedulers, working 4 on, 4 off, on long shifts. According to Mr Lotter, he told the claimant that if he was able to return to work, he could be included in this new team, but he would have to fit into this new working pattern. The claimant's understanding of this conversation was that this restructure followed on his "resignation", and that he had to apply for a new position if he wanted to be in it.

23. That evening he emailed his managers expressing surprise that his earlier email had been read as a resignation, especially when in the conversation on 28 June had explained that it was a short-term difficulty because his daughter was ill but he hoped to have a solution once he had met the new childminder on 1 July. Until the morning of 3 July he had understood that he would be working from home in the short term. He had worked "tirelessly" to get to the office as much as possible, and to confirm what was wanted. He had confirmed in his 2 July email that he could work Monday to Friday 7 AM to 4 PM. He was "perplexed" that the Resource Managers' meeting had been arranged so soon after he had emailed about his difficulties, and he had not

been told about it. He understood from colleagues that this action was being considered because Hakim had not managed to cover his portfolios well while he was on leave, so was no longer in post. He asked for a meeting with HR , and asked why was he being treated as having resigned when it had been left that he would update him on 3 July.

24. On 5 July the respondent held its second restructure meeting, at which the 4 new jobs and their hours were explained. After the meeting the claimant was asked to stay behind for a meeting with Paul Lotter and Jackie Bainbridge of HR. The claimant was told that HR advised that a solicitor would construe his email of 27 June as a resignation (the claimant understood that they had already sought legal advice to this effect) and could accept it if they wished. He reiterated that he was had not intended to resign, he was trying to sort something out. He was told again that the terms of this email amounted to a resignation. Paul Lotter also complained about the "inappropriate tone" of the claimant's email of 3 July; he explained to the Tribunal that he did not like the criticism of Hakim.

25. The claimant telephoned next day to say that he would be happy to do the 4 - 4 shift pattern as a Scheduler. According to Mr Lotter he was pleased, and added the claimant to his plan.

26. He carried on working, but over the weekend many guards called in to say that they could not work on Monday, and he spent Sunday evening trying to fill the gaps, then had very little sleep, and when he woke up on 10 July feeling sick, shaky and with chest pain, he went to see his doctor and was signed off with stress and anxiety for 2 weeks. He telephoned Casimir, and went over the reasons why he felt stressed and anxious; his email to Casismir that afternoon attaching the doctor's note said: "I feel helpless and can't face work or the problems that I am facing almost every other day", attaching the fit note.

27. HR asked Casimir on 14 July for an update, saying they had heard it was work-related stress, so they needed to follow policy. Casimir replied that the claimant had sent a resignation letter on 27 June. HR replied that it was understood that the claimant changed his mind about resigning and that Jackie Bainbridge and Paul Lotter were managing it, Casimir was asked if the claimant was being offered counselling, and when he planned to speak to him next.

28. On 24 July the claimant returned to his doctor, as a few days earlier he had logged on his work emails to prepare to get back to work and the stress made him feel ill again. On this occasion the doctor prescribed medication for anxiety. The claimant returned home and sent Casimir the doctor's note and the name of the proposed medication.

29. After another week, and having taken some of the medication, the claimant says he could not continue, and had had no contact from the company for over 3 weeks. This appears not to be the case, as he had from time to time spoken by phone to Casimir, but he says he considered this an act of friendship, not an official approach from the respondent.

30. On 31 July the claimant emailed to say that he was resigning his position as Resource Manager with immediate effect. It was due to stress and the

effect of that on his health. The stress was caused by increased workload that was disproportionate to his other colleagues. There was a narrative about the increase in stress over the months, the failure to deal with it in mid-May when he tried to have a meeting, his email of 2 June, the fact that by 28 June no changes have been made, and that on 28 June he was told that changes were going to be made, at a meeting of which he had not been given notic,e that this would mean he must be in the office 5 days a week. Then on 3 July, when he came to say that he would be able to commit to working 5 days a week from 24 July, he was told that he had resigned. Then he had the meeting on 5 July with Paul Lotter and HR, at which he was told Paul Lotter was upset with his 3 July email, and "nothing concrete" came out of the meeting, the claimant still trying to make clear he had not resigned. He had struggled on, and then had to go sick: "the result of the stress of my job along with the restructure and the problems caused by the whole resignation issue". This was a breach of trust and he had been advised it amounted to constructive dismissal. The employer had not discharged his duty of care for his health. He also complained of being passed over for applications to contract manager positions.

31. Mr Lotter replied an hour and a half later, accepting the resignation, expressing surprise and regret.

32. In evidence with Paul Lotter explained that in his view the real reason for the resignation was personal challenges he had at home, not the difficulties in his employment, which he thought were temporary, as they were taking active steps to reallocate workload among the resource manager team, and had instructed a recruitment agency. From the point of view of workload, his resignation was premature.

33. As far as the tribunal can discover, was no criticism of the claimant's performance, though as noted there had been a verbal warning for conduct, and he seems to have been efficient and conscientious. Nevertheless, it seems colleagues had grumbled about the claimant continuing to work from home 3 days a week, and a point was taken in tribunal about the claimant being sick immediately before he worked extra shifts at client W, with the implication, that not directly put, that he was not in fact sick that day. Mr Lotter did not mention in his evidence any concern that the claimant was not working hard, but then the tribunal was invited to review many pages of print-offs showing when the claimant signed on and off his computer each day. It was not suggested that these had been checked at the time, or that this concern was a reason for their behaviour, and it was not out to the claimant that he routinely worked short hours, or was anything but an afterthought. The claimant did not challenge the respondent's witness about any suspicion that he was swinging the lead or not committed to the job. The Tribunal concludes that in fact at the time there was no such suspicion, and that the respondent accepted that he worked with commitment.

34. The claimant applied for work at a similar rate of pay and was interviewed for 8 or 9 jobs, without success. In the event he started work at the end of September as security officer for a transport company, working four nights on then four nights off, at £1,800 per month for his basic hours, and with overtime earning £2,500-£1,800 gross. He was treated as 'self-employed', such he had to meet his own tax and national insurance from this pay. He decided to apply for a Public Carriage Office licence to work as a private hire

minicab driver, and estimates he could earn between £170-£240 per day, before expenses and tax. He expects to get a licence shortly, there having been some delay while checking his medical history.

35. Asked if he would wish to be reinstated if the tribunal found he had been unfairly dismissed, he replied that he would not want to work with Mr Lotter, but he could work with other managers within the business. He believes this is feasible, because the respondent's business was only recently formed from an amalgamation of two earlier businesses, Knightsbridge Guarding, and First Security, with separate structures.

Relevant law

36. The right to unfair dismissal is conferred by the Employment Rights Act 1996. Dismissal is defined in section 95 and includes in subsection (1) (c) circumstances where:

> "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".

37. As explained in **Western Excavating v Sharp 1978 ICR 221**, the conduct of the employer must amount to a repudiatory breach of the contract of employment. The tribunal must establish whether there was such a breach by considering the actions of the parties, and the intention of the respondent is irrelevant – **Bliss v South East Thames Regional Health Authority (1987) ICR 700**. Where the term of the contract that is said to have been breached is the implied term of mutual trust and confidence, that term is that "the employer shall not without reasonable and proper cause, conduct himself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"- **Malik v BCCI (1997) IRLR 462**, confirming the test set out in the **Woods v WM Services (Peterborough) Ltd (1981) ICR 666,** where "the tribunal's function is to look at the employer's conduct as a whole and determine whether this is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

Submissions

38. The claimant argues that the respondent breached the implied term by: (1) from March or April 2017 increasing his workload which was both high, and disproportionate to that of his colleagues and (2) not assisting him in alleviating stress caused by the workload, when under obligation to ensure his safety at work, in particular taking no steps when he brought it to their attention on 2 June, despite having recognised the need to be reduce workloads and that he was under stress earlier in the year, and being on notice on 20 April that he was unable to sleep because of stress, and (3) intimidating him, by Mr Lotter aggressively trying to force him to resign when he could not find a solution to his personal problem, and finding out as of 3 July that he would have to reapply for a job. It is asserted that this caused further work-related stress, on top of the stress of the email of 2 June being ignored, he was being told that he had resigned, and so he could no longer

trust or talk to the manager Paul Lotter, or the HR Department.

39. On Polkey, the claimant points out that it was not inevitable that he would be dismissed in the restructure, because 4 posts remained for 4 people, and he said he could work the Scheduler shifts, that he did not contribute to dismissal, and he should not be penalised for not lodging a grievance, because in effect that is what 3 June email was, and it had not been acted on.

40. The respondent's case is that when they were notified by the claimant of his difficult and high workload they took steps to review both the claimant's workload and that of the team overall and decided to restructure, that they had good reason to interpret his email of 27 June as a resignation - it was very least equivocal - and in any case that discussion was not intimidating, and was not used as a chance to remove him from employment. The plans to restructure were discussed with him on 5 July. He had said on 2 July he could work in a pressured environment. They kept in touch with him while away from work, and his resignation on 31 July was unexpected. They had provided support, by allowing him to work from home, by taking steps to recruit new staff, and by restructuring the workload. In February 2017 they had followed up the need to support him, in June they were sympathetic and accommodating when his daughter was ill. When the claimant was off sick with stress, they assumed this was through family difficulty, not because of work.

41. In addition, the respondent argues that a proper process would have made no difference (Polkey), also the claimant contributed to his dismissal by his conduct, and that any award should be reduced by up to 25% for failing to follow the ACAS code on Discipline and Grievance. It is argued that he should have lodged a grievance rather than simply resign.

Discussion and Conclusion

42. The tribunal must decide whether there was a repudiatory breach of the implied term, either by failing to take steps to address workload, or by asserting he had resigned, or both. The claimant clearly believed both – the tribunal does not think the purported reason was cover for not being able to adjust to not being able to work from home from then on – but he may not have been thinking straight when upset and feeling under pressure.

43. It is clear to the tribunal that the claimant had made his unhappiness with his workload very clear, with his spreadsheets for the expected meeting in May and his email of 2 June, and that he had been told no more than "please bear with us". The respondent says it planned the restructure in order to deal with that concern, and this may be true, but they had told the claimant nothing about their plan, and did not invite him to the meeting. The Tribunal prefers the claimant's understanding - that he was not invited to the meeting because Mr Lotter had read his email as a resignation. As a result, he was not being told that his concern was being addressed. The explanations about others having more travel or fewer self-managed contracts were not provided to the claimant. The respondent did tell him on 28 June about the new need to work from the office – that did not address his workload. He speculated that the restructure was called to deal with his workload, but because Hakim had left. He was of course included in the consultation on 5 July, but the damage had

been done by then; the claimant was right to conclude that until that point the respondent had taken little heed of his high workload. By now, added to the damage, was the accusation that he had resigned.

44. Was the respondent right to read the 27 June email as a resignation? It is not clear, and as the respondent conceded, was at least equivocal. It talks of not being able to continue in the role, but reading on, the repeated reference to "until" indicates that the problem may be a temporary one and the claimant spoke only of the short- term. Reading this as a resignation was a mistake; an employer reading this ought to check with the employee what he actually meant. That would not have caused damage but for the insistence, in a formal meeting in the company of a representative from HR that he *had* resigned, when the claimant had said he would update them, and had told them he could commit to their hours from 24 July. This refusal to accept this was what the claimant meant, even when he had explained it, fatally damaged the claimant's trust that he would be treated fairly. Any reasonable employee would understand that he was not being believed despite his assurances, and that it was unfair that he should be treated like this when he had explained his temporary difficulty, made efforts to carry on, confirmed he would work the new hours, and so on. The claimant saw this as unfair; the respondent's suggestion in evidence that he was not working hard or long enough reinforces the impression that his perception of unfairness was correct.

45. The Tribunal concludes that this treatment, on top of the failure to acknowledge his workload stress, was repudiatory. It was not conduct an employee could be expected to put up with.

46. Some employees of course would have put up with it for the sake of continued employment, particularly as it seemed he would get some shift work, but the claimant made his election to resign, his mind affected by the unfairness of his treatment. The resignation was a response to the breach. He was therefore dismissed. The dismissal was unfair.

47. If the claimant had not resigned, would he have continued in employment? According to the respondent, there was a job for him in the new structure, and he had said he could work the Scheduler's hours. He had worked shifts before, he is working shifts now, night shifts can be very useful for people with school age children. There is no evidence to the contrary or to say the role no longer exists. If he had not resigned he would probably have worked on as a Scheduler.

48. Was he blameworthy, and should his award be reduced for contribution? The respondent does not detail what the conduct was. At best his contribution was not to make himself clearer in his email of 27 June. That does not make him culpable, and in any case if an employee is not clear it is for the employer to clarify it with him. The respondent, when he clarified it, simply did not accept the clarification.

49. Should the award be reduced for not following the ACAS Code? Employees are asked to make grievance and try to resolve the purpose of the Code is to foster better relations between employees and employers, and to lay out processes which help to keep disputes out of Employment Tribunals. The claimant had made a grievance, though it was not labelled as such, in his 2 June email. The respondent could also have treated his resignation on 31

July as a grievance and explored whether he might decide to stay on. It would not be just and equitable to reduce any award for any failing on the claimant's part. He had explained his unhappiness to the respondent, and not labelling that "grievance" on either occasion does not put him in breach of the Code. He complied with its spirit.

Remedy

50. The claimant has indicated a wish to be reengaged (that is, reemployed, but not in a job where he is managed by Paul Lotter). The Tribunal has a discretion what order to make. This is a case where that order may be a better remedy than compensation, as the claimant is now self-employed, not from choice, and while the ongoing partial loss may be small (though so far not precisely quantified) he has lost employment rights, the employer's national insurance contribution, and a pension scheme. The claimant may of course decide he prefers to work as a minicab driver.

51. The Tribunal will list a further hearing for remedy, at which the parties can adduce evidence as to loss (including pension) and the respondent can if it wishes make representations about the practicability of reengagement, and the tribunal can calculate compensation, with or without an order under section 115. If in the meantime the parties are able to agree the appropriate remedy, they should inform ACAS and the tribunal.

Employment Judge Goodman on 30 January 2018