



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr N Suter

Respondents
Grenson Motor Company Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 10 & 11 May 2018

EMPLOYMENT JUDGE Anstis (sitting alone)

Representation:

Claimant: Mr A Mellis (counsel)

Respondent: Mr R Johns (counsel)

JUDGMENT

The claimant's complaints of unfair dismissal and breach of contract are dismissed.

REASONS

A. INTRODUCTION

An outline of the claim

1. Mr Suter brings claims of unfair dismissal and breach of contract against Grenson Motor Company Limited. His complaints arise out of his resignation, which he says was in law not a resignation but a constructive dismissal.
2. Grenson Motor Company Limited is a car dealership selling four brands of cars from adjacent premises in Crewe. John Middleton is the managing director of Grenson Motor Company Limited. Sean Pattinson is the sales director. Mr Suter was employed as a sales manager. He reported to Mr Pattinson. Mr Pattinson reported to Mr Middleton. Mr Suter had worked for Grenson Motor Company Limited for approximately five years, during which time he had held various different sales management roles. At the time his employment ended he was sales manager for the Suzuki dealership.

3. The repudiatory breach of contract relied upon in respect of his constructive dismissal claim is an alleged assault by Mr Middleton on him which is said to have taken place on Thursday, 7 September 2017. This assault is the central point of the claim. If this assault occurred as alleged I do not think there can be any dispute that it amounted to a fundamental breach of contract – technically a breach of the implied duty of trust and confidence. If the assault did not occur, then it was not suggested by Mr Mellis that there was anything else which would amount to a repudiatory breach of contract.
4. The central question of whether the assault occurred is a matter of dispute between the parties. Mr Suter and Mr Middleton give very different accounts of the events of that day.

Evidence generally

5. Points were made by both sides in argument about witnesses who may have seen the events in question. Arguments were raised from both sides in respect of what was said to be Mr Suter's failure to properly identify and the respondent's failure to call particular witnesses. On the respondent's case, if there was no incident then there could be no witnesses to it. I would have benefited from hearing from the individuals identified (although only at the hearing) by the claimant. Nevertheless, I must proceed to determine the claim on the basis of the evidence I have heard, which amounts largely, although not entirely, to Mr Suter's word against Mr Middleton's. I do not consider that any failure to call or to identify particular witnesses should lead in this case to any inferences in favour of or against any party.
6. I will deal first with the evidence of two individuals whose evidence I did not find of assistance. The first was Alan McGirr. Mr McGirr gave evidence at the tribunal. He was director of a consultancy company that put on sales events for the respondent. These events lasted from Wednesday through to Sunday and he was there during the week in which the claimant resigned. He would have been on the premises on the day of the alleged assault, and also on the date on which the claimant walked out. He gave evidence that he was approached in February 2018 by the claimant, when in Crewe after work following another event at the respondent. He says "*the claimant asked if [my colleague] would provide him with a written statement stating that he had seen John Middleton assault him.*" He also says the claimant asked for a statement in respect of his leaving work on Saturday. Mr McGirr appears to have formed the view that there was something improper in this approach, and that his colleague was being asked to lie on behalf of the claimant. I will deal later with the question of whether the claimant is telling the truth about the assault, but I do not think Mr McGirr's evidence adds anything to that. The claimant was perfectly entitled to seek witnesses to the incident – particularly when all other witnesses would have been employees of the respondent – and I do not give that approach the interpretation contended for by Mr McGirr.

7. The claimant put forward a witness statement from Sam Eckersley - a service technician previously employed by the respondent but no longer employed. I was told that Mr Eckersley could not attend the tribunal hearing on account of his other work commitments. He describes witnessing an incident between the claimant, Mr Middleton and Mr Oakes. As part of this incident he says that Mr Middleton grabbed the claimant's jumper. It is inevitable in a disputed situation such as this that I will not place substantial weight of a witness statement such as this where the witness has not attended the tribunal. It also appears that it was not the claimant's case that Mr Middleton grabbed him during the course of the incident with Mr Oakes. Any physical assault is said only to take place later on in the showroom or sales office. Accordingly, I do not think that Mr Eckersley's statement assists the claimant and because of his non-attendance I do not place any significant weight on it.
8. There is no documentary evidence from the time of the incident relating to the matters in dispute.

B. THE EVENTS OF THE DAY

Background

9. With so much being disputed between the parties it is difficult to find any undisputed material against which to assess the events of that day. However, I take as my starting point the agreed fact that the claimant was suffering personal financial difficulties. I also take account of my observation of Mr Middleton in giving his evidence. He came across as someone who, when he felt he was in the right, was unwilling to listen to or appreciate alternative points of view. I should also say to Mr Middleton's credit that, as I will deal with later on, he also appeared to be an individual who was capable of dealing generously with his employees.
10. The cause of the initial dispute on 7 September 2017 was a missing logbook for a Renault Scenic car that had been taken in part exchange and was due to be scrapped. If it was scrapped without its logbook being available then there would be a financial penalty payable by the respondent. It appeared that Mr Suter was the manager responsible for, and therefore accountable for, the sale and accompanying documentation.
11. Mr Middleton as managing director did not keep regular hours at the garage. He attended as he saw fit to deal with matters that he felt required his attention. He had found the Renault Scenic car occupying a valuable parking space just outside the workshop. It could not be moved on without the logbook. This annoyed Mr Middleton as the car was taking up valuable space and needed to be moved on. Mr Middleton goes further than this in his evidence, saying not just the logbook was missing but "*I had reason to believe that the claimant had taken the logbook to revamp an incorrectly calculated deal*". Mr Middleton said that this was not the first time the claimant had done this, but there was no evidence before me of previous incidents. Mr Middleton explained to me that car

sales were not accounted for under the respondent's procedures until a complete set of papers, including the logbook, was submitted to an administrator. He suggested that by losing or delaying the logbook, Mr Suter would then be able to adjust the sale price and credit given for the part exchange of vehicle. He said that this was "*something the claimant had been guilty of on previous occasions*". Whether rightly or wrongly, he formed the view that the loss of the logbook was a device adopted by the claimant to cover false accounting.

12. Since the claimant was accountable for the logbook, Mr Middleton took up the question of the missing logbook with him. On Mr Middleton's account of events, the claimant had named a series of people each of whom either had held or currently held the logbook, but none of whom turned out to actually have it when Mr Middleton made enquiries. These individuals were the salesperson who had been responsible for the sale, the administrator who would have recorded the sale, and the workshop manager who took charge of the vehicle after the sale. The workshop manager is Nigel Oakes.
13. During the course of his discussions with the claimant, Mr Middleton threatened to deduct £100 from the wages of the responsible salesperson as a fine for the loss of the logbook.

Outside the workshop

14. After an argument with the claimant about this, Mr Middleton went off to search the car himself, in case the document was in the car. Mr Oakes had the key to the car. Mr Middleton got the key from Mr Oakes and went to search the car. Mr Oakes accompanied him.
15. While Mr Middleton and Mr Oakes were searching the car, the claimant came down to the workshop area. He says that he then told Mr Middleton that Mr Oakes may have the logbook, whereupon Mr Middleton ran across to the claimant, and shouted at him that he was now blaming Mr Oakes for the lost document. The account given by both Mr Middleton and Mr Oakes was that the claimant said that Mr Oakes had had the logbook – it was not that he might have had it – and that at the time the claimant could not see Mr Oakes was with Mr Middleton since Mr Oakes was out of sight checking for logbook in the back of the car. Mr Oakes then immediately accused the claimant of lying. Matters escalated with Mr Middleton then accusing the claimant of lying about Mr Oakes having had the logbook. They both describe the claimant as getting angry and, in Mr Oakes's words, "squaring up" to Mr Middleton.
16. On the claimant's account, he then suggested to Mr Middleton that Mr Middleton should check with the administrator for the logbook, and Mr Middleton went off to do so. On the account given by Mr Middleton and Mr Oakes, Mr Middleton told the claimant to go home or told him that he was suspended for three days. As may be expected, Mr Middleton and Mr Oakes are not used exactly the same words in respect of this incident

but I do not consider there is a material difference between the two of them in their description of the incident.

17. As regards the background to this incident, Mr Middleton says that the claimant sent him to see at least three people who were described as definitely having the logbook, but none of whom did. It seems highly unlikely to me that the claimant did say that each of these individuals had definitely got the logbook. Much more likely is the claimant's account that these individuals may have the logbook. However, taken against the background of Mr Middleton's view that the claimant was doing all of this to cover up an intention to "revamp" the deal it is not surprising that Mr Middleton formed the view that he was being deliberately sent on false errands by the claimant. By the time of the confrontation outside the workshop, I find that both men were very upset and angry with each other. The claimant appeared to be feeling particularly tense about his financial difficulties, and there was the threat of deductions being made from pay. In turn, Mr Middleton felt that the claimant had been misleading about the loss of the logbook, and that this was done with the intention of false accounting for the deal.
18. Based on my assessment of Mr Middleton giving his evidence, it would not be difficult for Mr Oakes to understand on Mr Middleton asking for the keys to the vehicle that Mr Middleton was angry about the situation and the lost logbook. It cannot be often that the managing director asked for the keys to a vehicle to deal with such a mundane matter. That Mr Oakes accompanied Mr Middleton to search the vehicle suggests that Mr Oakes thought that this was a matter of some seriousness to Mr Middleton.
19. In putting forward the idea that Mr Oakes had had the logbook I do not understand the claimant to have been attempting to place blame on Mr Oakes or to say that he had definitely had it. As before, the claimant was attempting to be helpful in resolving the problem. However, given that Mr Oakes would have understood that the loss of the logbook was a matter that Mr Middleton was taking very seriously it is not surprising that Mr Oakes took this as being a suggestion that he was responsible for the loss of the logbook and then reacted strongly in accusing the claimant of being a liar. I accept that this was said by Mr Oakes, and also that during the course of this confrontation Mr Middleton said that it was the claimant himself who was lying. What was already a bad situation between the claimant and Mr Middleton had become worse.
20. Against that background, I consider Mr Middleton's account that he immediately suspended the claimant to be more likely to be accurate than the claimant's account that Mr Middleton took the claimant's advice to go and see the administrator about the logbook.

In the sales office

21. The claimant returned to his office, which was a glass office visible from the main showroom.

22. The claimant's account of what happened next is as follows:

“John went to see the administrator, who confirmed to him that he ... had seen the document. In the meantime I returned to my office to get on with my work.

The next thing was that John came down to my office, as I was moving into the showroom, brushing past me confirming the administrator's account, and suggesting that he owed me an apology. In response I told John that I was not particularly interested in his apology as such but was more concerned at the way he had flared up and spoken to me in the workshop in the presence of Nigel and Co. This response from me was blunt, direct and in language which made it clear that I was extremely unhappy at the treatment I had suffered.

At this point John grabbed me by the shirt collar and tie, called me into my office and shouted that I was finished. He added a number of personal insults to this, told me that I could get a bus home, and that he did not want to talk to me anymore and effectively sacked me on the spot.”

23. In contrast, Mr Middleton says:

“when I went back into the building, I found Neale sitting in his office at his desk. I stood at the door to his office and asked him why he was still there when I had told him to go home.

Neale jumped up, barged past me and shot out of the door.”

24. The claimant's account involves a number of matters that I find improbable, but certainly not impossible.
25. The first of these is that Mr Middleton would have come to the claimant and offered an apology, albeit as the claimant described in his oral evidence, a grudging one. Mr Middleton did not strike me as somebody who would readily apologise to an employee in such circumstances. Even on the claimant's account, the missing logbook had still not been found but the most that would be known was that it had passed through the administrator's hands at some point. I consider it unlikely that Mr Middleton would have apologised, even grudgingly.
26. The second improbable point is that the rejection of the apology would affect Mr Middleton in such an extreme manner. If Mr Middleton had calmed down to such an extent that he felt willing to offer an apology I find it difficult to accept that he would then flare up again to such violence.
27. The third is that he would have undertaken such violence in full view of other members of staff and possibly customers who were on the premises.

28. I find Mr Middleton's account to be the more likely of the two.

Subsequent events

29. The claimant then recounts an incident in which he went to see Mr Middleton to tell him that his (the claimant's) son was on his way to collect him, and says "*at this point John was calmer and told me that I was suspended until the following week*".

30. Immediately after his suspension or dismissal, the claimant had telephoned Mr Pattinson but it not be able to get through. Mr Pattinson called him back, and the claimant took the call in Mr Middleton's presence. Mr Middleton said this was because he had come across him on the phone at a side entrance. The claimant says that he told Mr Pattinson that he had been dismissed by Mr Middleton, who was now suspending him. In any event, it is common ground that Mr Middleton took charge of the phone and told Mr Pattinson to leave it to him (Mr Middleton) to deal with.

31. Both sides agree there was a further meeting or discussion between the claimant and Mr Middleton. My initial impression had been that all of these events occurred in a relatively short period of time towards the end of the working day. However, in his oral evidence the claimant said that the whole process had taken between 4 - 5 hours from start to finish. Mr Middleton suggested that any confrontation taken place in the morning and the claimant had subsequently worked a full day through to 6 o'clock. In either case it is clear that the claimant worked on for a substantial period of time after any confrontation.

32. While both sides agree there were further discussions with Mr Middleton, their account of those are not consistent with each other. On the claimant's account Mr Middleton told him that he (Mr Middleton) had a history of violence and if he were younger he would have knocked him out. On the claimant's account Mr Middleton "*went on to suggest that I would be going to an employment tribunal and that, if so, he would understand why. He nevertheless was rational, conciliatory and sought to explain once again the procedure had not been followed. He was conciliatory to the extent that we should both shake hands and put the matter behind us. I told him that I was not sure that was what I wanted to do.*" On the claimant's account he, the claimant, went on to complain about pay cuts that he had suffered, and also the threats of fines that had been made by Mr Middleton. He says that Mr Middleton rescinded the suspension and promised to sort out any financial difficulties the claimant may have.

33. Mr Middleton's account is as follows:

"Neale was in a state, and I asked him what this was all about. We went back inside and discuss matters behind closed doors.

Neale was crying. He told me he was broke; and that he had been broke for the past three months. He said he was getting uptight about mistakes. He had bought a house, and had a big mortgage. He said his basic wage was not enough to live on, and he could not pay bills.

I told Neale that even if he had issues with his pay, he had to talk to Sean Pattinson about it. I told him to calm down, and asked him what he needed to get through immediately. He said he needed £1,000 so I told him I would lend him the money. We went upstairs, and arranged for a cheque to be made out to him for £1,000. Neale took the cheque and arranged for his son to collect the cheque, presumably so it could be paid into the bank the same day.

All this happened before lunchtime on Thursday, 7 September 2017.”

34. It is common ground that the claimant worked the rest of the day as normal.
35. In his oral evidence, the claimant readily accepted that Mr Middleton had, on learning of his financial difficulties, given him a cheque for £1,000 on that day.
36. This is an unusual and significant point and does not square well with the aggressive conduct the claimant had previously attributed to Mr Middleton. It is plainly action which goes to Mr Middleton's credit, and it is such a specific point occurring on that day that I am concerned that although the claimant referred to this meeting and general discussion of his financial circumstances in his witness statement there was no reference at all to this advance of £1,000 from Mr Middleton.
37. In respect of this meeting, the claimant's evidence is, as before, that Mr Middleton was prone to dramatic mood swings, having gone in a relatively short period of time from assaulting him to treating him generously through this advance of wages, while at the same time contemplating that the claimant may take proceedings against the company arising out of what had happened. This is improbable, but not impossible. As with the alleged assault, I find the account given by Mr Middleton to be more probable. The claimant was under considerable stress at the time. He had had a difficult confrontation of one kind or another with Mr Middleton earlier in the day. There was talk of deductions being made from wages. Even without that he was being subject to criticism for not having followed proper procedures – a matter which, rightly or wrongly, seem to have been raised with him before. It is understandable that a man in that position may find it all too much and confide in his employer. What I find it much harder to accept is that such a conversation happened in the aftermath of a violent assault from Mr Middleton.

C. THE FOLLOWING DAYS AND THE FCA AUDIT

38. On the claimant's account, he had a difficult night's sleep that night. There were various new procedures being introduced at work, along with the special event being put on by Mr McGirr and an "audit review". The "audit review" is a reference to an audit of FCA compliance being carried out not by the FCA themselves but by consultants engaged by the garage in order to ensure that the garage did not get into trouble with the FCA. The claimant also says that there was a difficult and possibly troublesome part exchange deal to be completed which "*was the sort of transaction which had the potential to press all John's procedural buttons*".

39. The claimant concludes:

"I went home, suffered another sleepless night and decided the next morning that I could not carry on, despite my need for a job, such was the extent of my anxiety and stress.

I arrived at work that Saturday morning 9 September 2017, picked up my belongings, spoke to some colleagues and left with immediate effect."

40. On Mr Middleton's account of events:

"he came into work on Friday morning, and seemed equally fine on Friday morning, prior to the FCA compliance meeting.

However, Neale's demeanour changed after the meeting, and he made a comment that he was fed up with FCA compliance obligations.

I then discovered that Neale had come into work on Saturday morning, but then suddenly left, telling his team that he would not be coming back."

41. I heard evidence from Andrew Parry, a sales executive at the respondent, as to what happened during the course of the FCA compliance meeting. Mr Parry says:

"a number of irregularities were flagged up which did not look good, and our team came out worst. The issue of most concern to the FCA was that it had been exposed that I had falsified customer signatures on paperwork. This was true. I had been told to do this by Neale Suter. This was not something that meant customers suffered any financial loss or detriment, but Neale told me it was irrelevant just move the process on quicker."

42. When those irregularities were identified by the compliance company, Mr Parry took sole responsibility for them. He says this was down to his military background and a sense of loyalty to his colleagues, including

the claimant. However, after the claimant left, Mr Parry wrote a letter saying that he had been told by the claimant to insert the signatures on the forms.

43. Following this, Mr Perry was disciplined, with the sanction being a transfer to a different role, although by the time of the hearing he had been allowed to resume his previous role as a sales executive.
44. When asked to comment on the possible consequences for the claimant of these matters being known while the claimant was still employed, Mr Pattinson said that the claimant would have been subject to disciplinary measures, but, very fairly, Mr Pattinson also said that he could not predict what the disciplinary outcome would be.
45. Mr Johns presented this evidence for two purposes. The first was in support of his argument that the true reason for the claimant's resignation was not to do with any alleged assault, it was to do with fear of his misconduct being uncovered by the compliance investigators, and the possible consequences of that. The second was in respect of a *Polkey* argument if I should find that the claimant's dismissal was unfair.
46. I am not in any position in this case to attribute blame as between Mr Parry and the claimant. No documentary evidence was provided from which I could conclude that there had actually been any misconduct by claimant in respect of these matters. As regards the argument that the claimant had resigned because he was fearful of the outcome of the FCA compliance audit, at the time of the claimant's resignation as far as he knew, whatever the underlying rights and wrongs of the situation were, Mr Parry was taking sole responsibility for the problems. Fear of being disciplined in respect of the FCA compliance audit seems, therefore, very unlikely to be reason for his resignation.
47. As regards any argument for a *Polkey* deduction, if the point arises, I do not see this as being sufficient evidence on which I could conclude that a deduction should be made. Mr Pattinson himself said that he could not predict the outcome of the disciplinary process. Mr Parry had only received a transfer to another job, and before long was back in his previous job. There is not sufficient material from which I could sensibly conclude that the claimant's dismissal was likely or had any degree of probability attached to it on account of FCA compliance problems.

D. OTHER MATTERS

48. I have previously explained that I consider Mr Middleton's account of events to be more likely to be true than the claimant's account of events. I will now consider the other arguments that were raised to see if they make any difference to that assessment.
49. One point in this case that was highlighted by Mr Mellis and which I found curious is the difference – or at least the difference in emphasis – between the respondent's grounds of resistance and the statements now

produced to the tribunal. The grounds of resistance say very little about the events of 7 September, simply suggesting that any physical contact was much less the claimant made out. That is somewhat different to what I was told in the hearing, which was that there was no assault at all by Mr Middleton on the claimant and that to the extent that there had been any contact it was only as the claimant brushed past Mr Middleton on attempting to leave his office. The two points are not necessary inconsistent, but there is certainly a difference of emphasis.

50. The second is a point that Mr Mellis was keen to emphasise during the course of his submissions. While accepting that it was not for the respondent to show the reason for the resignation, Mr Mellis suggested to me that I was faced with a binary choice – either the claimant resigned because of the assault or he resigned because of the FCA compliance problems. As set out above I have found that he did not resign because of the threat of disciplinary action in respect of the FCA compliance audit.
51. Strictly speaking, as Mr Mellis accepted, it is for the claimant to show the reason for his resignation and not for the respondent to show an alternative reason. The significance of Mr Mellis's arguments is that the claimant would have no reason to resign other than the assault. On this analysis, the very fact of the resignation provided support for the contention that the assault happened, since why else would he resign, especially when he was known to have financial difficulties and did not have a job to go on to?
52. A third point is the evidence of Mr Pattinson. Although he was the claimant's manager he was not at work during any of the events in question. During the course of Thursday 7 September the claimant called him to say that he had been suspended by Mr Middleton. The claimant says that he told him he was dismissed and then suspended, but Mr Pattinson said it was suspension that was referenced.
53. Mr Pattinson was also the person who the claimant formally resigned to, by telephone. He says that he does not remember the contents of that call. I would be surprised if that was the case if the claimant had told him that the reason for his resignation was an assault by Mr Middleton.
54. One point that I have been particularly aware of in this case is that all of the witnesses called by the respondent carry allegiance to the respondent and Mr Middleton. They are all his employees or contractors. That certainly does not mean that they are not telling the truth, but it is the lens through which I must view their evidence. It is striking, therefore, that Mr Pattinson did not hesitate to say that he was not sure what the outcome of the claimant's disciplinary procedure would be, and would not even speculate on the result. It would have been far more convenient for the respondent if Mr Pattinson had said that the claimant was bound to be dismissed or even that he was likely to be dismissed. Bearing that in mind, the fact that Mr Pattinson talks of suspension, not dismissal, and does not recall any allegations in respect of an assault is a point in the respondent's favour.

55. The first two points, while carrying some weight, do not change my earlier view that Mr Middleton's account is more likely to be correct than the claimant's account. As regards the grounds of resistance, the difference in emphasis is curious, but there are no substantial inconsistencies. As regards the reason for the resignation, short of the reason for the resignation being a repudiatory breach of contract, it is not necessary for me to find any alternative reason for the resignation. However, during the course of the hearing I formed the view that whatever the rights and wrongs of the assault, the claimant was effectively fed up with working at the garage, with working for Mr Middleton, with dealing with the various procedures and processes involved and the consequences if Mr Middleton thought there had been a breach of procedure. After the problem with the logbook, he had lost a lot of confidence (in the personal rather than the technical "trust and confidence" sense). The claimant's explanation that "*I could not carry on, despite my need for a job, such was the extent of my anxiety and stress.*" stands by itself as the likely reason for his resignation, even if there was no assault as alleged. I therefore do not find that the claimant's resignation is of itself suggestive that the assault occurred.

E. CONCLUSION

56. For the reasons given above I find that the assault alleged did not occur.
57. This was the point said to be a breach of the duty of trust and confidence so there was no repudiatory breach of contract.
58. The claimant was not constructively dismissed and his unfair dismissal and breach of contract claims fail.

F. OTHER POINTS

59. My reasons were given orally at the hearing. Written reasons were requested at the conclusion of the hearing hence these written reasons are now produced together with the judgment.
60. After evidence and submissions had concluded and immediately before I gave my decision Mr Mellis suggested that there may have been a previously unidentified and unaddressed unlawful deductions from wages claim in the claimant's claim form in respect of earlier reductions in his pay, and that he may seek to make an amendment in respect of identifying and developing that point. After taking further instructions from his client he said that he would not be applying to make such an amendment, so this judgment disposes of the entire claim.

Employment Judge Anstis

11 May 2018