MF

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Smits**

Respondent: **David Phillips Furniture Ltd**

Heard at: **East London Hearing Centre**

On: **25th May 2018**

Before: **Employment Judge Reid (sitting alone)**

Appearances:

For the Claimant: **In person**

For the Respondent: **Did not attend**

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant was unfairly (constructively) dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996**.

2. **The Claimant was wrongfully dismissed by the Respondent.**

3. **The Claimant's claim for breach of contract is dismissed.**

4. **The Claimant's application for a preparation time order is refused.**

Compensation

A. Basic award

3 complete years of service aged under 41

3 x £489 = £1,467
Less reduction under s122(2) Employment Rights Act 1996 at 50% (£733.50)

= £733.50

B. Compensatory award

26 weeks x £393.92 = £10,241.92

Plus pension

26 weeks x £10.53 = £273.78

Plus loss of statutory rights £350

= £10,865.70

Less reduction for failure to comply with ACAS Code of Practice at 15% (£1,629.85)

= £9,235.85

Less reduction under s123(6) Employment Rights Act 1996 at 50% (£4,617.92)

= £4,617.92

Total compensation A+B = £5,351.42

REASONS

Background

1. The Claimant brought claims for unfair dismissal, for wrongful dismissal (notice pay) and for breach of contract by a claim form presented on 14th January 2018.

2. The Claimant was employed as Project Site Manager by the Respondent from 15th July 2014 to 12th October 2017 when he resigned.

Issues

3. The Claimant's case was that he had in effect been forced to resign by the Respondent because the Respondent told him that he had two options, either resignation or demotion, when the Claimant had returned to work after a period of unauthorised absence. The Claimant's case was that he had been unable to return on time from his trip to Lithuania (an authorised holiday) because his girlfriend, who was undergoing medical treatment in Lithuania, had stayed in hospital longer than had been anticipated and he had extended his stay for this reason. The first issue was therefore whether if the Respondent did give the Claimant those two options, this amounted to a constructive dismissal because the Respondent had breached a term of the Claimant's contract of employment. If it did, the next issue was whether that breach played a part in the reason why the Claimant resigned and whether the Claimant delayed in resigning and thereby affirmed the contract. The burden of proof

was on the Claimant to show that there was a constructive dismissal by the Respondent.

4. Because he was not represented I explained the basis of a breach of contract claim to the Claimant because he was claiming £25,000 for multiple claimed losses (bundle page 6). He agreed that this was not a situation where the Respondent had ever contractually agreed to pay for these items such that the Respondent had breached a term of his employment contract. However if he won his unfair dismissal claim I identified that some of these claimed losses (eg loss of bonus or expenses of looking for work) might be recoverable as part of his unfair dismissal compensation.

5. The Claimant also included a claim for 35 hours preparation time undertaken by his friend Mr Koczyk in preparing the claim and for the hearing.

6. The Claimant attended the hearing accompanied by his friend Mr Koczyk. He had prepared the bundle and also provided a copy of his August 2017 payslip. The Respondent did not attend the hearing. A telephone call was made to Ms Zariffis (HR) of the Respondent when no-one had arrived and she explained that she had received the Tribunal's letter dated 2nd May 2018 but had misunderstood it, thinking it meant that as there had as yet been no decision on the Respondent's application for an extension of time to submit its response (ET3), the hearing would not go ahead until that decision had been made. She confirmed that the only person who would have attended in any event would have been herself and no other witnesses. I considered delaying the start of the hearing to enable her to attend but she said she was around 3 hours' drive away at another site. I considered that the letter dated 2nd May 2018 when read in conjunction with the notice of hearing dated 23rd January 2018 was clear ie that the hearing would go ahead on 25th May 2018 but that the first issue the Tribunal would have to decide was the Respondent's application for an extension of time. I decided to proceed in the absence of the Respondent taking this into account under Rule 47 of the Tribunal Rules 2013. The Claimant gave oral evidence to clarify some matters in his witness statement and about his claimed losses. I allowed the Claimant extra time to prepare the submissions he wanted to make at the end of the hearing.

<u>Respondent's application dated 29th March 2018 for an extension of time to submit response (ET3)</u>

7. Because the Respondent had not attended so that further questions could not be asked, the only explanation I had for the late submission of the Respondent's ET3 was the email from Ms Zariffis dated 29th March 2018.The Respondent's ET3 was due on or before 20th February 2018 and was not received by the Tribunal until 6th March 2018, at that point without explanation for its lateness.

8. At the hearing I refused the Respondent's application for the following reasons under Rule 20 of the Tribunal Rules 2013. Firstly the explanation from Ms Zariffis said that the ET3 had been ready for submission but that she was absent on 19th February 2018 due to illness. She did not suggest that she was also then absent on 20th February 2018 or thereafter until 6th March 2018 when it was submitted, around 2 weeks late. In the absence of any further explanation I therefore decided that the ET3 could have been submitted on 20th February 2018 (a working day) when she was back at work, taking into account it was ready. Her email to the Claimant and the

Tribunal dated 6th March 2018 was in any event inconsistent with that explanation because it suggested that Ms Zariffis thought she had already sent the ET3 to the Tribunal on 18th February 2018 such that her subsequent explanation for the lateness was an attempt to deal with the fact that she thought she had submitted the ET3 but in fact hadn't. Secondly I considered the balance of prejudice as between the parties but considered that whilst if refusing the application the Respondent would be unable to rely on its defence that the Claimant had voluntarily resigned, the burden of proof was still on the Claimant in any event because this is a constructive dismissal claim. Thirdly I considered the merits of the Respondent's proposed defence, namely that the Claimant had voluntarily resigned and that any discussions about a more junior role were after he resigned, in the context of possible future jobs if he re-joined the Respondent at a later stage. Weighing all this up I decided that the prejudice to the Respondent was outweighed by its failure to provide a good reason for the lateness and the fact that even without an ET3 the burden of proof was still on the Claimant to establish that there had been a constructive dismissal as claimed. Although the Respondent's response was not accepted it had raised a potential issue as regards the Tribunal's jurisdiction to hear the claim because the Respondent said that ACAS had not been in contact with the Respondent about early conciliation (ET3 3.1). I was therefore required to consider this issue in any event – see findings below.

9. As regards the application of Rule 21(3) Tribunal Rules 2013, the Respondent had already been notified of the hearing date and physical participation in the hearing was no longer relevant because the Respondent had not attended. I however decided that I would take into account the two written statements of Ms Zariffis and Mr Phillipe which the Respondent had sent to the Tribunal and which had been included in the bundle prepared by the Claimant (pages 56-60).

Findings of Fact

Jurisdiction – ACAS pre-claim conciliation

10. The Claimant provided his certificate number in his claim form (2.1) and provided a copy of the certificate recording that the process started on 30th October 2017 and closed on 30th November 2017 (page 52). Given the absence of any evidence that this certificate had been wrongly issued and without the Respondent having been contacted as part of the process I find that the certificate was properly issued and that there is therefore no issue as regards jurisdiction to hear this claim.

The Claimant's holiday to Lithuania

11. I find that the Claimant had a pre-booked holiday to Lithuania from 6th September 2017 to 19th September 2017 arranged with the Respondent's agreement. I find based on his oral evidence that the purpose of the visit was to see his girlfriend who was in Lithuania for medical treatment, having had surgery on 4th September 2017. I find based on the Claimant's oral evidence that she was still in hospital when he arrived in Lithuania because her stay in hospital had been extended longer than had been anticipated. I find based on his oral evidence that he stayed longer in Lithuania than planned because he felt she was worse than he had expected.

12. I find that the Claimant contacted his manager Mr Korsakowski on 18th September 2017 to say that he needed to stay longer in Lithuania and would not

be coming back to work on 20th September 2017 as planned because his girlfriend was still in hospital. On 21st September 2017 Mr Korsakowski sent the Claimant a message (page 51) asking for an update which the Claimant did not reply to until 24th September 2017 (page 51) saying that he would be back in London at the beginning of October, around 4th-7th and that he would tell the Respondent then what the situation was. I find this was not the Claimant saying he would be back to work on a specific date or saying he would be back at work at all, it being left that he would explain matters further when back in London. He did not say in that message as claimed in his witness statement on page 3 (para 3) that he would tell the Respondent as soon as possible when he would be able to come back to work. I therefore find that at this stage the Respondent did not know whether the Claimant intended to return to work. I therefore find that Mr Korsakowski's response asking if he was staying with the Respondent or not was not unreasonable.

13. On 25th September 2017 (page 51) the Claimant sent a further message to Mr Korsakowski saying he 'stayed' at 75% ie the chances of him coming back were 75%. I find that the percentage likelihood of him returning and staying with the Respondent must therefore have already been discussed on 18th September 2017. I therefore find that the Respondent was entitled to conclude at this stage that there was a real prospect that the Claimant would not be coming back to work. The Claimant told Mr Korsakowski that he would tell the Respondent the following Saturday when he would be back at work. However the Claimant sent an email (page 44) the same day to Mr Phillipe saying he would be back at work at the beginning of October. I find this to be a rather mixed message telling his two managers different things which added to the confusion about what his plans were. I find that Mr Phillipe received the Claimant's email (page 51). I do not have the time the Claimant sent the email (page 44) so it is not clear whether Mr Phillipe was sending the texts at page 45—46 before he got the email or after receiving it (but not having read it). The Claimant sent a further message to Mr Phillipe on 26th September 2017 (page 47) checking that Mr Phillipe had received the email. I find that Mr Phillipe did not reply to that email. Taking all this into account I find that the Respondent reasonably thought at this stage that the Claimant might be coming back to work in October but that it was not 100% certain. The Respondent did not in any event have a date the Claimant was saying he would return on.

14. The Claimant in his witness statement does not refer to any further contact with either manager until 10th October 2017 (page 4 para 7). I therefore find that there was no contact from the Claimant after 26th September 2017 to 10th October 2017 when he texted Mr Phillipe only to say that he was back in London (page 47). I find that the Claimant failed to keep in touch with the Respondent during this period of around 2 weeks and as he had had to book a flight to return is likely to have known before 10th October 2017 that he would be back in London on that date but did not tell the Respondent at an earlier stage. He had not returned to work at the beginning of October which was what he had told the Respondent he would do (page 44). In the meantime however the Respondent had not on the evidence before me started its absent without leave (AWOL) procedure (or any other disciplinary procedure).

15. Taking these findings into account I find that the Claimant was on unauthorised absence from 21st September 2017 and failed to keep the Respondent properly informed. The Claimant had been rather vague and not very helpful about his intentions or kept the Respondent informed as best he could. It was not suggested

that his girlfriend's illness was life threatening and whilst not obliged to pass on all the details of her medical problems, gave no information at all about whether she was still in hospital or not or whether he was needed to stay because there was no other family to help and if so, why. The Respondent could only go on what it was told which was not very much. I find that the Claimant showed a rather careless attitude to the Respondent because even when back in London he only briefly texted to say he was back in London and did not say he would be back at work. I find his behaviour to the Respondent during the absence and this attitude to the Respondent to be blameworthy, even though he may have had personal reasons for wanting to remain in Lithuania.

The Claimant's resignation

16. Mr Phillipe asked the Claimant to come and see him the next day (12th October 2017). I find that Mr Phillipe advised the Claimant again that he could resign but told the Claimant that the alternative was staying on in a more junior role (furniture installer) because he had been absent without leave. I find that this was a demotion because that is the role the Claimant held until May 2017 (page 9) when he was promoted to project site manager and received a pay rise. I find that Mr Phillipe was in effect imposing a disciplinary sanction on the Claimant without having gone through a disciplinary process for his absence without leave, even though the Respondent had a procedure to deal with this situation and whether or not the Respondent would have acted reasonably had it gone through that procedure. I find that the discussion of the more junior role was on 12th October 2017 (and not as stated on page 60 not until 13th October 2017) because the text on page 47 is a follow up to a previous discussion and I therefore find it was discussed on 12th October 2017.

17. I therefore find that by telling the Claimant he could either resign or be demoted the Respondent breached the express terms of the contract of employment. There was a contractual right to allocate the Claimant to another role (page 20, clause 4.1) but not an express right to demote him to a less well-paid role. The Respondent's actions also breached the implied term of trust and confidence because it was in effect presenting the Claimant with a foregone conclusion about the outcome of any investigation or consideration of the reasons why the Claimant did not return from holiday on time. This is not a finding that the Respondent would not have been justified in taking disciplinary action but it had not in practice done so and yet imposed in effect a disciplinary measure on the Claimant which if he did not accept he was being told he had to resign.

18. I find that the Claimant resigned in response to these breaches. He did not delay because he resigned on 12th October 2017. Although there was some disparity in the date of termination in the ET1 (14th October 2017, 5.1) and the Claimant's witness statement and oral evidence (12th October 2017) I find that the Claimant resigned with immediate effect on 12th October 2017.

19. The Claimant did not raise a grievance with the Respondent after he resigned. He criticised the Respondent for not giving him the chance to resolve things internally (witness statement page 4 para 6) but he did not himself raise a grievance with the Respondent which was unreasonable, taking into account his own contribution to the situation.

The Claimant's contract of employment – notice period

20. The Claimant was entitled to one month's notice under his contract of employment (page 20 clause 2.1). He was not paid for any notice period because the Respondent treated him as having voluntarily resigned.

The Claimant's losses

21. I find based on his oral evidence that the Claimant found new employment as a driver in Lithuania from 15th April 2018, earning £380 net per month. I find that although he has ongoing losses after that point because on a much lower salary, it would not be just and equitable to award losses beyond that point because the Claimant chose to return to Lithuania after around 6 weeks and then remain in Lithuania rather than remaining in the UK and looking further for work in the UK which would have earned him a higher salary, because of the disparity in pay levels as between Lithuania and the UK, such that the Claimant was inevitably going to earn less in Lithuania even in a comparable job.

22. I find that the Claimant had no contractual right to a bonus under his contract of employment based on his contract at page 22 (clause 9.1) and on his oral evidence to the effect that a bonus of around a week's pay was paid at the company's discretion when a project had gone well. The Claimant said there were three projects between June and July 2017 which had gone well (one in Senegal, in Berlin (two projects) and the Sky Gardens project, page 89) and in relation to which he had expected a discretionary bonus of around an extra week's pay for each of the three projects, which bonuses were usually paid in practice around every 3 months. I find based on his August 2017 payslip that he was paid a bonus in August 2017 but it is not clear whether this was for one of the projects identified. Taking into account the above findings I find that had the Claimant remained in employment he would not have been awarded these discretionary bonuses because whether or not the Respondent took disciplinary action against him because of the unauthorised leave, it would not have exercised its discretion to award bonuses for those projects because of his unauthorised absence.

The Claimant's conduct

23. Taking into account the above findings as to the Claimant's approach to the Respondent during his unauthorised absence before the dismissal I find that the Claimant's conduct before dismissal was such that it would be just and equitable to reduce the basic award by 50% under s122(2) Employment Rights Act 1996.

24. Taking into account the above findings as to the Claimant's approach to the Respondent during his unauthorised absence I find that the Claimant's conduct contributed to the dismissal and find that the compensatory award should be reduced by 50% under s123 (6) Employment Rights Act 1996, being a just and equitable proportion.

Relevant law

25. A constructive dismissal (and thus a dismissal for unfair dismissal purposes) is defined in s95(1)(c) Employment Rights Act 1996 as where the employee terminates

the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

26. In *Western Excavating v Sharp [1978] IRLR 27* it was identified that a constructive dismissal must involve a repudiatory breach of contract, going to the root of the contract or which shows the employer no longer intends to be bound by one or more of its essential terms. The burden of proof was on the Claimant to show that there was a fundamental breach of contract, it contributed to why he resigned and that he did not delay, thus affirming the contract. The breach of contract by the employer must be an effective cause but does not have to be the only cause or the principal cause of the employee resigning (*Wright v North Ayrshire Council [2014] IRLR 4*). Where the employee themselves is already in breach of contract but the employer has not yet accepted the breach and terminated the contract, the employee can still accept the employer's breach and claim constructive dismissal even though already in breach themselves (*Atkinson v Community Gateway Association [2014] IRLR 834*).

27. In a constructive dismissal case the reason for the dismissal is the reason why the employer breached the contract which lead the employee to resign (*Berriman v Delabole Slate Ltd ICR 546 CA*). However where the Respondent does not put forward a reason for the treatment but only says there was no dismissal, no fair reason has been shown so that the dismissal is unfair because no fair reason has been shown (*Derby City Council v Marshall [1979] ICR 731 EAT*). In this case the Respondent's ET3 was not accepted so there was no explanation of the reason for the treatment to take into consideration.

28. An employee is under a duty to mitigate his losses by making reasonable efforts to find other work .The burden of proving a failure to mitigate is on the employer. In calculating an employee's loss this duty must be considered by the Tribunal (s123(4) Employment Rights Act 1996). In this claim the Respondent did not discharge this burden because it did not take part or adduce evidence of a failure to mitigate by the Claimant.

29. It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*).In this claim the Respondent did not adduce any such evidence because it did not take part.

30. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an award may be reduced or increased where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), if just and equitable in all the circumstances to do so. Because this was a constructive dismissal case the relevant part of the code related to the employee's initial obligation to raise a grievance.

31. The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where where any conduct of the employee was such that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*). Where the employer has not raised this as an issue, the Tribunal can still make this kind of reduction provided it finds it is just and equitable to do so (*Carmelli Bakeries v Benali EAT 0616/12*).

32. The compensatory award for unfair dismissal can be reduced under s123(6) Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*). A reduction can be made even if the dismissal is a constructive dismissal provided there is a causal link to justify a reduction for contribution (*Polentaruti v Autokraft Ltd [1991] IRLR 457*). A reduction can be made even if this issue is not raised by the employer (*Swallow Security Services Limited v Millicent EAT 0297/08*).

Reasons

33. Taking into account the above findings of fact I find that the Claimant was unfairly constructively dismissed by the Respondent when he was told that he could either be demoted or could resign. If his reason for resigning was also partly because the Claimant wanted to keep his options open as regards a return to Lithuania the Respondent's actions were still an effective cause of his resignation. The Respondent had not taken action to terminate the contract because of the Claimant's unauthorised absence before the Claimant resigned. He was also wrongfully dismissed because he was not paid for his one month's notice. He cannot however recover the same loss twice.

34. I make no reduction for a failure to mitigate his losses by the Claimant because the Respondent did not discharge the burden on it to show this. I also make no reduction under *Polkey* because the Respondent has not adduced evidence that the Claimant would have been dismissed in any event or would only have remained in employment for a fixed period. Based on the findings set out above I have limited the Claimant's losses to the point at which he found a new job in Lithuania because it is not just and equitable to award losses beyond that point.

35. The Claimant's claim for his lease costs (page 6 under breach of contract) is a claim for his living costs which would be paid out of his income. If he is made an award for loss of income he cannot also be awarded his living costs which would have been met out of that income. This cost is therefore not recoverable as part of compensation for unfair dismissal.

36. The Claimant's claim for his flight back to Lithuania (page 6) is not recoverable as part of compensation for unfair dismissal because he chose to move back to Lithuania and look for work there, where he would be likely to earn less. It is not a cost arising from his dismissal because it does not flow from his dismissal but from this choice. The cost of his flight back to the UK again (and hotel cost) for this hearing is also not recoverable as part of his unfair dismissal compensation.

37. Taking into account the above findings I do not include loss of bonus in the calculation of loss.

38. The Claimant also claimed in his earlier version dated 18th February 2018 the costs of looking for new work. I asked him to provide details but he was unable to do so and confirmed he had no evidence of such costs. The costs of looking for work are therefore not included in the calculation of his losses as part of his compensatory award.

Preparation time order

39. The Claimant made an application for a preparation time order saying that the total hours claimed were 35 hours. I asked the Claimant to break this down and he said it was 14 hours preparing the claim form, 15 hours on the witness statement, 2 hours on the bundle, 2 hours dealing with ACAS and 2 hours corresponding with the Respondent.

40. The Tribunal's powers to make a preparation time order are set out in Rule 76 of the Tribunal Rules 2013. It cannot include time spent at the final hearing (Rule 75(2)). I asked the Claimant why he considered that such an order should be made and he explained that it was because Mr Koczyk had spent a lot of time on his claim. The test I have to apply is whether the Respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way it has dealt with the claim. Whilst the Respondent did not get its response (ET3) in on time and has not attended this hearing I do not consider this reaches this high threshold such that a preparation time order should be made. I therefore make no preparation time order.

Employment Judge Reid

1 June 2018