EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Fox-Warren	AND	Ivan Clarke Catering Butchers Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 16 October 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr I Clarke, Managing Director

JUDGMENT

The judgment of the tribunal is that:
1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant compensation in the sum of £6,065.00.
2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") apply in this case. The Prescribed Period is from 28 March 2017 to 16 October 2017 and the Prescribed Amount is £3,836.00; and
3. The claimant's claims for breach of contract, unlawful deduction from wages, and for accrued holiday pay, are all dismissed.

REASONS

1. In this case the claimant Mr Jeffrey Fox-Warren claims that he has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable. The claimant also brings monetary claims for unpaid notice, unlawful deduction from wages, and accrued but unpaid holiday pay. These claims are denied and the respondent also asserts that they may be out of time.
2. I have heard from the claimant, and I have heard from Mr Ivan Clarke and Miss Susan Stiling on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following

facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The respondent's business was established in 1986 and is situated in Ilfracombe in North Devon. Mr Ivan Clarke, from whom I have heard, is a director and the proprietor of the respondent company. In general terms the respondent supplies meat to the catering trade and the business is largely seasonal with over 60% of its customer base closing for the winter months. The respondent has a system whereby it reviews its employment needs in the Spring and generally issues fixed term contracts for a year on 1 April each year.
5. The claimant worked for the respondent as a delivery driver. His first stint of employment was from 3 August 2013 to 2 November 2013 when his contract was terminated during the winter off-season. The claimant was then re-employed from 25 February 2014. The respondent says that this was until 29 March 2014, but in any event on 1 April 2014 the claimant was engaged for the summer season until 30 September 2014.
6. After 1 October 2014 the claimant carried out occasional work only on a casual basis.
7. On 1 April 2015 the claimant was issued with a full-time contract commencing on 1 April 2015 and expressed to be for the period of 12 months. The agreed contractual hours were 38 hours per week. On 1 April 2016 the claimant was issued with a further full-time contract of employment which again was expressed a run for a period of 12 months.
8. The respondent had a number of capability and performance issues with regard to the claimant’s employment. The respondent complains that there were a number of instances during the last two years of the claimant's employment when the claimant might have been dismissed for misconduct or other performance issues. He was issued with a final written warning on 4 April 2016 which was expressed to last for a period of six months. The respondent also made it clear that it did not really wish to dismiss the claimant because of the difficulty in obtaining delivery drivers.
9. On reviewing the matter in March 2017 the respondent decided to deal with the claimant's performance issues by reducing his hours. Mr Clarke and the claimant had a meeting on 21 March 2017 at which Mr Clarke explained that he thought that the job was getting too much for the claimant. There is a dispute as to whether they discussed the claimant's previous knee injury. In any event Mr Clarke notified the claimant that he would be offered another 12 month contract on 1 April 2017 but that his working hours would be reduced from 38 to 24 hours per week.
10. The claimant did not wish to agree to this change and by letter dated 22 March 2017 sought to exercise a formal grievance. He objected to the reduction in hours and objected to the respondent's conclusion that he was not able physically to perform his duties fully.
11. Mr Clarke responded by letter of 23 March 2017 acknowledging the formal grievance but stating that having reviewed the last few months of the claimant’s employment, and the final written warning on 4 April 2016, his actions were justified. Nonetheless he agreed to a meeting on 27 March 2017.
12. At that meeting Mr Clarke confirmed that the claimant was only being offered a reduced contract from 38 hours to 24 hours per week. The claimant was effectively told in no uncertain terms that he would not be offered a renewed contract if he did not accept the reduction in working hours.
13. The claimant then made a contemporaneous written note of that meeting recording the events as set out above. He also wrote a letter of resignation dated 28 March 2017. He stated: "I hereby tender my resignation due to the fact that I believe you have fundamentally breached the contract that existed between us." Mr Clarke decided to accept the claimant's resignation and by letter dated 30 March 2017 acknowledged the resignation letter and sent a final payslip and form P45. The claimant was paid his one week in hand and one week in lieu of notice.
14. I have not heard any evidence about the work undertaken by the claimant during the period between 30 September 2014 and the new 12 month contract on 1 April 2015. I therefore find that the claimant was continuously employed from 1 April 2015 until 28 March 2017, when the claimant resigned without notice.
15. With regard to the claimant's claims for accrued holiday pay and unlawful deduction from wages, it is now agreed between the parties that the claimant had taken 198 hours of

holiday against agreed entitlement of 190 hours. 30 of these accrued hours were not paid, but this was because 30 hours holiday pay were deducted by way of repayment for damage to a wing mirror. On 27 September 2016 the claimant had signed a letter agreeing to authorise deduction from his wages of 30 hours as agreed repayment for this damage. The end result of this is that the claimant did not suffer any unlawful deduction from his wages in this respect, and did not have any accrued but unpaid holiday entitlement as at the termination of his employment.

16. Having established the above facts, I now apply the law.
17. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.
18. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
19. Section 86 of the Act requires an employer to give not less than one week's notice of termination of employment once the employee has been continuously employed for more than one month. Section 108 of the Act provides that there is a qualifying period of employment of not less than two years to bring a claim for unfair dismissal. Section 97(2) of the Act provides that where the contract of employment is terminated by the employer and the notice required by section 86 would have expired on a later date, then the effective date of termination is that later date for the purposes of section 108.
20. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
21. The claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
22. The claimant also claims in respect of holiday pay for accrued but untaken holiday under Regulation 14 of the Working Time Regulations 1998.
23. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT.
24. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
25. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is

leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

26. It is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
27. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
28. This has recently been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will the be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
29. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
30. In the first place in the claimant's three monetary claims are all dismissed. For the reasons explained above there was no unlawful deduction from the claimant's wages, and there was no accrued but unpaid holiday pay outstanding as at the termination of the claimant's employment. The claim for breach a contract in respect of notice pay is also dismissed because one week's pay in lieu of notice was paid by the respondent.
31. Finally I turn to the claimant's main claim which is his claim for unfair dismissal. I find that the effect of section 97(2) of the Act is that the claimant is entitled to add his one week's statutory minimum period of notice to his length of service. The effective date of termination of the claimant's employment was 4 April 2017. He is therefore entitled to bring his unfair dismissal claim by virtue of sections 97(2) and 108 of the Act.

32. I find that the respondent acted in fundamental breach of contract by imposing a reduction in working hours on the claimant from 38 to 24 hours per week. This was in fundamental breach of the express term that the claimant was employed for 38 hours per week, and also a fundamental breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The claimant was effectively told that he would not be offered further employment if he did not accept that reduction. The claimant refused to do so. In direct response to that fundamental breach of contract claim the claimant resigned his employment. I find in these circumstances that the claimant's resignation can be correctly construed to be his dismissal. I find that the claimant was therefore constructively dismissed with effect from 28 March 2017.
33. I also find that even bearing in mind the small size and limited administrative resources of this respondent, the respondent did not act fairly and reasonably in all the circumstances of this case. I therefore find that the claimant was unfairly dismissed.
34. The claimant does not seek reinstatement and seeks compensation for unfair dismissal as follows. The claimant was paid £295.00 gross per week, which was £262.00 net per week. He was aged 60 at the time of dismissal and his basic award is 2 x 1.5 x £295.00, or £885.00.
35. For the compensatory award the claimant claims his losses from 3 April 2017. He undertook some casual work and earned £800.00. He also signed on and claimed Universal Credit. He obtained alternative employment on a part-time basis with effect from the second week in June 2017 and now earns alternative earnings of £150.00 per week net. Until that new job he lost 10 weeks salary at £262.00 but gives credit for the £800.00, which amounts to losses of £1,820.00. With effect from the alternative employment his ongoing net loss is £112.00 per week, which for a further 18 weeks until the date of this hearing is £2,016.00. The claimant's losses from dismissal until the day of this hearing are therefore £3,836.00.
36. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") apply in this case. The Prescribed Period is from 28 March 2017 until 16 October 2017. The Prescribed Amount is £3,836.00.
37. The claimant also claims future loss limited to 12 weeks at his ongoing differential of £112 per week, which are further losses of £1,344.00.
38. The respondent is therefore ordered to pay total compensation in the sun of £6,065.00 being a basic award of £885.00 and a compensatory award of £5,180.00.

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Employment Judge N J Roper
Dated 16 October 2017

Judgment sent to Parties on

6 November 2017