Case No: 2420798/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr C Decker

Respondent: Extra Personnel Logistics Limited

Heard at: Liverpool **On:** 1 February 2018

Before Employment Judge Wardle

Representation
Claimant: Mr C Millett - Solicitor
Respondent: Mr P Cadden - HR Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair constructive dismissal is well founded and the respondent is ordered to pay him the sum of £16,825.12 comprising a basic award of £4942.92 and a compensatory award of £11,882.20 in respect of which latter award the recoupment provisions do not apply.

REASONS

1. By his claim form the claimant has brought a complaint of unfair constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996).

2. The respondent by its response has denied that the claimant was constructively dismissed as alleged at all. In particular it denies that the claimant was dismissed contending that he resigned and denying that it breached any express term of his contract of employment as alleged or at all or that it conducted itself in a manner such as to destroy the implied term of mutual trust and confidence between itself and the claimant as alleged or at all.

3. The Tribunal heard evidence from the claimant and on behalf of the respondent from Mr Brad Richardson, Managing Director, and Ms Pamela Jones, Finance Director, which was given by written statements and was supplemented by responses to questions posed. It also had before it a bundle of documents, which it marked as "C1".

4. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

5. The claimant, whose employment began on 1 December 2008 and ended on 6 July 2017 by reason of his resignation, was employed by the respondent as a Branch Manager.

6. The respondent is a driver recruitment agency specialising in the logistics industry based on Merseyside.

7. The claimant's role, which he had occupied since late 2009 involved him in the everyday operations of the business, which included the recruitment of LGV/HGV drivers under the Recruitment and Employment Confederation guidelines and placing them into numerous transport haulage companies in the North West. He was also responsible for all administration, payroll operations and development of drivers ensuring their full compliance regarding driver hours, tachograph rules and legislation and dealt directly with all of the customers and helped resolve any issues that may have arisen during transport operations.

8. According to the claimant's ET3 the contract of employment he entered into with the respondent on 23 December 2008 provided that there was a 40 hour week and that employees were expected to work flexibly between the hours of 7.00 a.m. and 7.00 p.m. However in or around July 2015 an agreement was reached that his working hours would be reduced from 40 hours per week over five days to 32 hours per week over four days. At this same time it was also agreed that he would be released from having to do any on call duties except to cover holiday and emergencies for Mr Richardson.

9. On 20 February 2017 the claimant was approached by Mr Richardson and asked if he would reduce his working days from four days to two days, which equated to a reduction in hours from 32 to 16 and a loss of income of £205.95 per week. The next day he wrote to the claimant at page 40 of the bundle confirming the reduction of the claimant's working week to his working on Monday and Tuesday only and giving the reason as being the loss of two contracts of business and the industry market being quiet at this period of time which had led him to conduct a review of the company's staffing levels and the way in which it operated and to come to the conclusion that he needed to reduce the claimant's working week. By his letter he also informed the claimant that the consultation period in respect of this contractual variation would end on 6 March 2017 and that a further meeting would be held with him at 4.00 p.m. the following day and referred to an offer he had made at their meeting of six additional hours doing sales, which whilst having been declined by the claimant he stated would be left open during the consultation period.

10. On 3 March 2017 the claimant wrote to Mr Richardson to inform him that after reviewing his current situation and financial commitments he was unable to afford any reduction in his current hours and that he was willing to discuss matters further at the meeting scheduled for 7 March 2017.

11. At the meeting on 7 March 2017 due to the resignation of the claimant's daughter in law, Saraya Decker, who had also been informed of a reduction in

her working hours at broadly the same time as the claimant, which she was unable to accept, as it would have taken her below 16 hours employment which she needed to work for the purposes of the receipt of benefits Mr Richardson offered the claimant an additional 8 hours or three days. However on the claimant's evidence, which was not challenged, the additional 8 hours was subject to the claimant resuming the on-call work that he had been released from in July 2015. In response the claimant stated that he would be willing to accept the reduction from 32 hours to 24 hours if his day rate was increased from £102.97 to £110.00, which would mean that the cost cutting sought by the business by the reduction in his hours would still be achieved albeit that the saving per week would be slightly less at around £81.88.

12. No agreement was reached between the parties at this meeting and the matter remained unresolved. It was picked up again following the claimant's return from leave on 17 May 2017 when Mr Richardson by an email dated 19 May 2017 asked him which three days were best for him, to which the claimant responded pretty much immediately to say that he only wanted to do Monday to Wednesday and that he needed a new contract to include a day rate of £110.00 for eight hours to be worked between 8.00 a.m. and 4.00 p.m.; a guarantee in respect of the three eight hour days and a 90 day notice period for any further changes or reduction in hours. Mr Richardson emailed him back to say that he would have this for him on Monday, which was 22 May 2017. In the event this did not happen. Instead on 30 May 2017 Mr Richardson emailed the claimant with a new contract at pages 56-59 which did not include any of the three things that the claimant had requested despite Mr Richardson seemingly having agreed to them by his email of 19 May 2017 when saying he would have 'this', which one would reasonably construe as his meaning. a contract containing the terms stipulated by the claimant, for him on Monday. In addition the contract made provision for the claimant to be subject to 24 hour on call duties in respect of which there was no entitlement to additional payment.

13. On the evening of 1 June 2017 Mr Richardson emailed the claimant to say that the business was currently not in a position to offer him a pay rise in reference to the claimant's request to have his daily rate increased from £102.97 to £110.00 and that he had emailed him his new contract and was now requesting this to be signed. He concluded by saying that he felt that there was nothing else now to discuss in respect of this contract and that he would start it from Monday 5 June 2017.

14. The claimant emailed Mr Richardson back that evening to say that he had not agreed a new 3 day contract and that after reviewing his position, which included not having had any increase in his hourly rate of pay since September 2013 he did not think that his request for a daily rate of £110.00 was unreasonable. He went on to say that he no longer felt valued as an employee and that he also felt that he was being forced out of the company for asking for an additional £0.88 per hour. He concluded by saying that due to the forced reduction of his hours and future loss of earnings he had been put in the unfortunate position of having to leave as he could no longer afford to continue working for the company after 8 years' service adding that his current contract required him to give one month's notice and he requested confirmation that his notice period would be paid at his current salary.

15. On 5 June 2017 the claimant wrote further to Mr Richardson reiterating the matters he had raised in his email and giving him notice of his decision to

terminate his current contract with effect from 5 July 2017, which resignation letter he handed to Mr Richardson that morning. Receipt was subsequently acknowledged in writing the same day by him. In his letter Mr Richardson stated that he had noted the claimant's comments in his email and that he would welcome a meeting to discuss these matters further adding that if he had not heard from him by 9 June 2017 then he would presume that he did not wish to take up his offer of a meeting.

16. In advance of this the claimant emailed Mr Richardson on 8 June 2017 to say that he did not feel that a further meeting to discuss his comments would be of any benefit to him as he had already stated by his email dated 1 June 2016 that he felt that there was nothing else to discuss and that the (new) contract would start from Monday 5 June 2017, which would start his three day week as agreed Monday to Wednesday, which the claimant pointed out had not been agreed by him.

17. The claimant's employment subsequently terminated on 5 July 2017 on completion of his notice period.

Law

18. The relevant law for the purpose of this claim is to be found in the Employment Rights Act 1996 (ERA). In relation to constructive dismissal section 95(1)(c) ERA states that an employee is dismissed by his employer 'if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'.

19. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract which shows an intention no longer to be bound by one or more essential terms of that contract.

20. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not then affirm the contract and lose the right to claim constructive dismissal.

Conclusions

21. Applying the law to the facts as found the Tribunal reached the following conclusions. In line with the essential components of an unfair constructive dismissal claim the Tribunal considered first of all whether the respondent had fundamentally breached the claimant's contract of employment. The breach relied upon here was the unilateral imposition of a 25% cut in the hours and pay of the claimant, which in financial terms represented a loss of about £102.00 per week. Whether a breach is fundamental is a question of fact and degree and a key factor is the effect that the breach has on the employee. Hours and pay are fundamental to a contract of employment and the Tribunal was satisfied that a reduction of this magnitude was a serious matter for the claimant, which led it to conclude that the respondent had fundamentally breached the claimant's contract of employment.

22. Turning to the second component as to whether the repudiatory conduct caused the claimant to resign it was clear on the evidence that it did. The exchange of emails between him and Mr Richardson following the presentation on 30 May 2017 of the new contract with the unilaterally imposed less favourable terms and his letter of resignation dated 5 June 2017 make it plain that that the enforced reduction in his hours and the consequential loss in pay were the reasons for his resigning.

23. Dealing finally with the third component of delay and possible affirmation of the contract any suggestion that the claimant delayed too long before resigning and therefore affirmed the contract appeared to the Tribunal to be fanciful having regard to the time-line of events established by the documentation, which saw the claimant being informed on the evening of 1 June 2017 that there was no prospect of the respondent increasing his daily rate to cushion slightly the effect of the hours and pay reduction and that he would be working to his new contract on the reduced terms with effect from 5 June 2017, in response to which the same evening the claimant indicated that he could no longer afford to continue working for the company and referred to the notice he was required to give to leave the company before then on 5 June 2017, his first day back in work, handing in his letter of resignation with contractual notice.

24. The Tribunal accordingly concluded that the essential elements of an unfair constructive dismissal had been made out by the claimant, which required the respondent to show a fair reason for dismissal and that it acted reasonably in treating it as a sufficient reason for dismissing the claimant. In this case no fair reason has been pleaded in the respondent's ET3 and whilst it was suggested that there were business reasons for the dismissal due to the loss of two contracts and a business downturn to bring it under the potentially fair ground of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held the Tribunal considered in circumstances where neither Mr Richardson's nor Ms Jones' remuneration from the business was reduced that a saving of £102.00 per week from the claimant's pay was realistically going to have any bearing on the company's future viability. As such the Tribunal further concluded that the respondent had failed to show that it had a fair reason to dismiss the claimant.

25. In the claimant's ET1 it was pleaded that the respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, which in submissions was clarified as relating to the respondent's failure to address the claimant's email of 1 June 2017, setting out the issues he had with the company's actions, as a grievance. In this regard the Tribunal found that the letter was capable of satisfying the definition of a grievance and that the respondent's response to it fell short of the requirements on it pursuant to the Code of Practice in the sense that a formal meeting should have been held with the claimant without unreasonable delay but rather the respondent offered what was in effect an informal discussion in circumstances where it had already made its position clear regarding the new contract's imposition as to there being nothing further to discuss and failed to respond to the claimant's concern in this regard.

Remedy

26. Having concluded that the claimant's complaint of unfair constructive dismissal was well-founded the Tribunal, with the agreement of the parties,

proceeded to address the claimant's remedy arising from its finding. In this regard his preferred remedy was compensation and the respondent accepted that he had mitigated his loss following the termination of his employment on 5 July 2017. It also accepted that the figures for the purpose of calculation contained in the schedule of loss prepared on his behalf were correct.

27. Turning to the calculation of the claimant's remedy of monetary compensation, which is made up ordinarily of a basic award and a compensatory award it was agreed between the parties in regard to the former that he was entitled to a basic award of £4,942.92, based on 8 complete years' continuous employment, all of which was worked whilst the claimant was 41 or older, giving a multiplier of 12 of his gross weekly pay of £411.91.

28. Dealing next with his compensatory award his immediate loss fell to be calculated between the date of his dismissal on 5 July 2017 to the date of hearing, which comprised a period of 30 weeks. Based on a net weekly salary of £329.51 it was agreed that his immediate loss was £9885.30. It was further agreed that the sum of £350.00 was an appropriate sum for the loss of his employment protection rights, which took his immediate loss figure to £10,235.30. This figure was then reduced by the sum of £3614.10 (£120.47 x 30), which had been earned by the claimant over this period as a part-time coach driver taking it to £6621.20.

29. In regard to the claimant's future loss 30 weeks net pay less earnings were sought in the schedule of loss. However, the Tribunal reduced the future loss period to 20 weeks on the basis that the claimant , notwithstanding his age, had a number of strings to his bow in terms of his employability which it considered would enable him to find work of a more commensurate value to that he had lost over this period. This gave a future loss figure of £6590.20 (£329.51 x 20) from which was deducted 20 weeks' earnings from his part-time driving work in the sum of £2409.40, which took the figure to £4180.80.

30. Combined the claimant's compensatory award totalled £10,802.00. This figure was then uplifted by 10% in the sum of £1080.20, which the Tribunal considered just and equitable, for the respondent's failure to comply with the ACAS Code of Practice as described above, taking the figure to £11,882.20.

31. The respondent is ordered to pay him the sum of £16,852.12 in satisfaction of his basic and compensatory awards.

32. The recoupment provisions do not apply to this award of compensation.

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21 March 2018

Employment Judge Wardle

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 March 2018

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS