



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T. Gwaza

**Respondent:** Tesco Stores Limited

**Heard at:** Birmingham

**On:** 3 & 4 August 2017

**Before:** Employment Judge Butler

## **Representation**

Claimant: In person

Respondent: Miss F. Campbell, Solicitor

# JUDGMENT

The Judgment of the Tribunal is that the claim of constructive unfair dismissal is not well founded and is dismissed.

# REASONS

## The Claim

1. By a claim form submitted on 24 February 2017, the Claimant brought a claim of constructive unfair dismissal. The basis of his claim is that, having been offered a job by a cleaning company called NIC, the Respondent, through its employees, sabotaged that job by giving him a poor reference based on false information. The Respondent defended the claim.

## The Issues

2. The issue in this case is whether the Respondent's employees behaved in such a way as to fundamentally breach the implied duty of trust and confidence in his contract of employment thereby preventing him from obtaining alternative employment.

The Law

3. Section 95(1)(C) Employment Rights Act 1996 provides that 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”
4. In *Western Excavations v Sharp* [1977]EWCA Civ 165, the Court of Appeal held that in order for an employee to succeed in a claim of constructive unfair dismissal, the employer’s conduct must amount to a significant breach going to the root of the contract of employment, the employee terminates the contract by reason of that conduct and does so quickly so as not to be considered to have affirmed the breach.

The Evidence

5. There was a substantial agreed bundle of documents and references to page numbers in this Judgment are to page numbers in that bundle. I heard evidence from the Claimant, and for the Respondent from Mr L. Palmer, Produce Manager, Miss C. Henry, Employee Relations Manager, Miss D. Manning, People Manager and Mr P Baily, Store Manager.
6. All of the witnesses provided witness statements which were taken as their evidence in chief. They were all cross-examined.
7. Mr Palmer gave his evidence in a straightforward manner and answered the Claimant’s questions without hesitation. He confirmed he had known the Claimant for a long time and they had a good relationship. On 29 October 2016 the Claimant had seemed on edge and when Mr Palmer asked him what was wrong, the Claimant called him the devil and threw some trays on the floor. He was asked to go to the office to calm down. He confirmed that he told Mr Kihoho of NIC that the Claimant was temperamental and, at the time he said this, had assumed he had already secured the job with NIC. He said the Claimant was sometimes prone to outbursts and Mr Palmer had told him he needed to calm down. When Mr Palmer was on paternity leave, the Claimant telephoned him and shouted down the telephone that Tesco had taken his job away from him.
8. Mr Baily said that he had spoken to Mr Kihoho and given his opinion of the Claimant. He did not consider this to be a reference, he was merely asked for his opinion and gave it. He did not believe his comments influenced Mr Kihoho neither did he think they were deceitful or misleading having given his opinion based on what he knew from the two years he had worked in the store. At the time he gave this opinion, he did not know the Claimant was intending to leave the Respondent. He confirmed that he may have discussed with Mr Kihoho how the Claimant could countenance doing two full time jobs in the store. NIC was contracted to clean the store, but Mr Baily had no influence over that contract. I noted that Mr Baily freely accepted his

comments at paragraph 5 of his witness statement when he confirmed he had spoken to Mr Kihoho in response to an enquiry from him and said he did not believe the Claimant had appropriate leadership skills to be a manager and could at times be very emotional and difficult to manage.

9. Miss Manning also gave her evidence in a straightforward manner. She confirmed she had discussed a potential job offer from NIC with the Claimant. Her evidence was that she said it would be a shame for him to leave, but if he went to have a better job with more money, she would wish him well. She recalled that the Claimant had never told her how many hours he would be working, but had expressed concern about him carrying out two jobs on a full-time basis. She told the Claimant that if he wanted to work full-time for NIC and part-time for the Respondent, she would endeavour to support him. She answered questions about her meeting with the Claimant on the 29 October 2016 during which he had been agitated and aggressive and his comments about how he heard he had not been successful in getting the job with NIC were inconsistent with the evidence of Mr Kihoho who had told Miss Manning that the Claimant had screamed at him on the telephone.
10. Miss Henry gave evidence around her involvement in producing the investigation report at page 150. She confirmed she found no evidence that Mr Baily had accused Mr Kihoho of poaching the Claimant or that he had been harassed or victimised by Mr Palmer.
11. My impression of the Respondent's witnesses was that they had given truthful evidence in a straightforward manner and had answered questions without hesitation. They painted a picture of having to deal with the Claimant who was prone to emotional outbursts involving shouting, often based on his own somewhat speculative interpretation of events.
12. In contrast, I did not find the evidence of the Claimant to be consistent with his allegations or reliable. There were a number of occasions when being cross-examined he simply said he was confused and could not answer the questions. His evidence was particularly inconsistent with documents in the bundle around the period between him allegedly being offered a job by Mr Kihoho and being told he had not been successful in obtaining that employment. For example, he said early on in his cross-examination that the Respondent was pressing him to make a decision as to whether he would take the NIC job and then said at page 39 in his statement of events, that they were trying to delay him making a decision. He then said he already had his decision which was not supported by a transcript of his meeting with Miss Manning at page 106V which said he was still contemplating whether to accept the job or not.
13. The Claimant also said during his cross-examination that he was not an emotional person which was totally inconsistent with the evidence of the Respondent's witnesses. The Claimant also secretly recorded his meeting with Miss Manning and a transcript of that meeting begins at

page 106. It is clear from that transcript, and was not denied by the Claimant, that he did become emotional on several occasions and was asked to lower his voice and calm down by Miss Manning.

14. Throughout the course of the proceedings, the Claimant maintained that Mr Baily had sabotaged his job with NIC through making adverse comments about him to Mr Kihoho. Mr Baily confirmed the comments he made to Mr Kihoho but the evidence of Mr Baily did not support the Claimant's conclusion. Further, as part of his grievance, Mr Kihoho was interviewed by Miss Henry during which he confirmed he had never offered the job to the Claimant and that he was not unsuccessful because of anything, anyone at the Respondent had said. He added that the Claimant had misunderstood what had happened and become upset and shouted at Mr Kihoho on the telephone. The Claimant also maintained that Miss Manning said she had a right to stop him leaving the Respondent and refused to accept two resignation letters he submitted. The Claimant was unable to substantiate this evidence with documentation.
15. The Claimant also maintained that Miss Manning said she would deal with him through an investigation or disciplinary process. He insisted that she had said this somewhere during their meeting, he was initially unable to direct me to where this had been said. He then said it was at page 106P which I noted made no such reference.
16. Questioned about his resignation letter at page 152, the Claimant said he had made a mistake in his phrasing of the letter. He had not wanted to leave the Respondent's employment but wanted to get a job in a different store. He said his resignation was a way of getting the Respondent to the negotiating table. This evidence was completely at odds with the Claimant's claim to have been constructively unfairly dismissed.
17. As previously mentioned above, I did not find the Claimant's evidence to be reliable. He gave me the impression of being highly emotional, prone to shouting and many of his allegations about the conduct of the Respondent's employees was exaggerated, could not be substantiated and at times was purely speculative.
18. For the above reasons, whenever there was a dispute on the facts, I preferred the evidence of the Respondent.

### The Facts

1. In relation to the issues before me, I find the following facts. The Respondent is a large company running supermarkets. The Claimant began working for the Respondent in 2010. In around October 2016, Mr Kihoho, a Manager with NIC, spoke to the Claimant about the possibility of a manager's job with NIC. Mr Kihoho did not at any time offer the Claimant that position, nor did he give him a date to commence employment.

2. Mr Kihoho spoke to Mr Baily and Mr Palmer about the Claimant and they both gave negative comments about his management abilities. In between the initial conversation with Mr Kihoho and being told he had not been successful in obtaining the employment, the Claimant considered the possibility of working full-time for the Respondent and NIC and also working full-time for NIC and part-time for the Respondent.
3. Having been advised that he had been unsuccessful in obtaining employment with NIC, the Claimant blamed various employees of the Respondent but, in particular, Mr Baily and had emotional and aggressive outbursts in conversations with Mr Palmer, Miss Manning and Mr Kihoho.
4. The Claimant raised a grievance on 26 October 2016 which was investigated by Miss Henry. She carried out a comprehensive investigation interviewing Mr Palmer, Mr Baily and Mr Kihoho. As a result of her investigation, she was unable to uphold the Claimant's grievance.
5. The Claimant resigned with effect from 28 December 2016 stating this was because of the way he was treated by the Store Manager and Department Manager. Miss Manning wrote to him on 25 January 2017 asking him to attend an exit interview which he did not attend.

### Submissions

19. For the Respondent, Miss Campbell submitted there had been no fundamental breach in this case. She said that the Claimant's explanations undermined his claim of constructive dismissal. It was not just a private matter for the Claimant to deal with alone as he was contemplating at one point trying to do two full-time jobs and this raised Health & Safety issues.
20. The Claimant submitted he had worked from the age of 20 years old and had managerial experience in Zimbabwe. He claimed he had been given bad references based on false opinions and that his character only became an issue when he was offered another job.

### Conclusions

21. The first issue to determine is whether any of the conduct of the Respondent or its employees amounted to a fundamental breach of the implied term of trust and confidence in the Claimant's contract of employment. As mentioned in his submissions, it was the Claimant's case that he had been given bad references based on false opinions. The evidence showed that only two employees of the Respondent made any comment to Mr Kihoho. These were comments made by Mr Baily and Mr Palmer. The comments can be summarised as indicating that the Claimant had no managerial experience, did not like change and was prone to emotional outbursts.

22. The evidence before me clearly indicated that the Claimant was indeed prone to emotional outbursts and shouting at others. This was the evidence given by Mr Baily, by Mr Palmer and Miss Manning and recorded in an interview with Mr Kihoho. On the balance of probabilities, therefore, I accept that comments were true. In relation to managerial experience, the Claimant could only point to managerial experience he said he had in Zimbabwe, training new members of staff and running his team of summer assistant replenishers when his manager was not present.
23. The circumstances of this case are, I accept, that Mr Baily and Mr Palmer gave truthful opinions of the Claimant. I also find on the evidence before me that, contrary to his claim, the Claimant was never formally offered employment with NIC, indeed, he accepts that he did not complete an application form and I find it highly unlikely that he would have been offered employment without this.
24. Having given honest opinions about the Claimant, even if Mr Kihoho decided not to employ him because of them, it is clear to me that the comments were honestly made and based on a true reflection of the Claimant's experience, character and personality. As such, they could not amount to a fundamental breach of the implied term of trust and confidence.
25. Accordingly, since there has been no fundamental breach of a term in the Claimant's contract of employment, there is no conduct of the Respondent upon which the Claimant can rely to succeed in his claim. I find the Claimant's case to have been largely founded on speculation for which there is, in any event, little foundation.
26. For the above reasons, I dismiss the claim.

Employment Judge Butler

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Date 15 August 2018