EMPLOYMENT TRIBUNALS

Claimant: **Mr S Burn**

Respondent: **McConnells Electrical Services Limited**

Heard at: **Nottingham** **On:** **Thursday 31 May 2018**

Before: **Employment Judge Blackwell (Sitting Alone)**

Representation
Claimant: **Mr Martin, Solicitor**
Respondent: **Ms Hindmarch, Solicitor**

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal pursuant to Section 95(1)(c) of the Employment Rights Act 1996 (the 1996 Act) fails and is dismissed.

2. The claim of wrongful dismissal also fails and is dismissed.

RESERVED REASONS

1. Mr Martin represented the Claimant and he called the Claimant himself to give evidence. He also called Ms Lynsey Nearn the Financial Director of Flying Higher and I also took into account a written statement from a Mr M Hill, a subcontractor to the Respondents. Ms Hindmarch represented the Respondents and she called Mr David Miller, a Director of the Respondent company, Mr P McConnell also a Director of the Respondents and Mr M Allen the Managing Director of McConnells Electrical Company Limited, an associated company. There was an agreed bundle of documents, references are to page numbers in that bundle. Because of a shortage of time both parties submitted very helpful written submissions and both parties commented upon each other's submissions. There is an agreed list of issues but as I indicated at the beginning of proceedings the fundamental question in relation to Mr Burn's main claim of constructive unfair dismissal pursuant to Section 95(1)(c) is that it is for Mr Burn to prove:

   1.1 That there was a repudiatory breach by the Respondents (McConnells) and;

   1.2 did Mr Burn resign as a consequence of that breach?;

   1.3 Did he do so without affirming the contract?

2. In his submissions Mr Martin points out that the question of affirmation is not in the agreed list of issues and that I should not depart from them, however I did refer to the question of affirmation and it is a fundamental principle of contract law which has to be determined. Mr Martin has dealt with the point in his comments on the Respondent's submissions.

3. The second issue is a claim of wrongful dismissal. I have to say I do not follow how this adds anything to the claim of constructive unfair dismissal particularly given that Mr Burn was placed on garden leave and was paid for his full period of contractual notice.

Findings of Fact

4. I begin by saying that I found neither of the main protagonists, namely Mr Burn and Mr Miller satisfactory witnesses. Mr Burn is perhaps understandably embittered not only by the events which led to his departure from McConnells but also by the subsequent allegations made against him. It is also clear that Mr Miller has gone to great lengths to "dig the dirt" on Mr Burn since the breakdown in the relationship between them. Both tended to exaggerate.

5. Mr Burn's employment initially began with an associated company MEC on 21 April 2097 as a Contracts Manager. McConnells itself was formed in 1999 to focus on customers involved in shows/events to include showgrounds, local and small works. Mr Burn transferred from MEC to McConnells and became a statutory Director on 3 April 2014.

6. There is a contract of employment which begins at page 35. On page 35 appears the following:

> "Job Title/Duties
>
> The title of your job and a summary of your main duties are set out in Schedule 1. Your employer may change you job description and may require you to carry out different and/or additional duties under this contract. You do not have a right under the contract to be provided with work or work of a particular kind."

7. It is common ground that the duties required to be carried out by Mr Burn are those set out in paragraph 7 of his proof of evidence.

8. McConnells had a number of customers; one of these was the Newark Show Ground and it was a major customer of McConnells and it is common ground that the loss of the showground's business would have been a major blow.

9. Mr Miller's evidence is that at some unspecified point, which he was unable to clarify during cross examination, in 2016 he became concerned with 2 aspects of Mr Burn's management. The first related to invoicing and the second the increasing amount of debt. He refers to pages 106 to 112. At page 104 is a letter of complaint from a customer though it is dated June 2017. At page 77 is an e-mail from Mr Miller to Mr Burn which does support Mr Miller's contention.

10. The second aspect was the allocation of work carried out to the wrong client. I am satisfied following lengthy cross examination that there was no financial consequence to the two customers involved but it is clear that this practice which was carried out by Mr Burn meant that McConnells could not get a clear view of the profitability of the task carried out for the two customers involved. Another complaint raised by Mr Miller was that late in 2016 Mr Miller took the view that the Newark's Antique Fair was being overcharged given that it has diminished in size over the years. I accept that Mr Miller instructed Mr Burn to take action and I further accept Mr Miller's evidence in 2016 he had not done so and Mr Miller took the matter on himself, however I accept that it took Mr Miller until April 2017 to actually deal with the point.

11. On 1 December 2016 Ms Hughes, the Event Manager of the Newark showground wrote to Mr Burn as follows:

> "We have recently had an inspection from our insurers who have asked to see a copy of the electrical installation inspection certificate. I know that this was carried out a couple of years ago but I do not have a copy of the current certificate. Could you let me have a copy as soon as possible as I need to send a copy to our insurers."

12. On 5 January 2017 Ms Hughes sent to Mr Burn a reminder and she did so again on 6 February 2017. On 7 February Mr Burn responded:

> "I am out of the office today. I will touch base with our QS and chase him. Looking at his calendar he is not in the office until Friday so it will probably be then."

13. Ms Hughes e-mailed again on 21 February as follows:

> "I have had our insurers on my case again about the safety certificate for the site. Please can you let me know what is happening with it?"

She sent a further reminder on 6 March indicating that the deadline had been reached. Mr Burn responded on 6 March indicating that there was trouble with the database but he would forward as soon as this was rectified. He did not do so.

14. On 17 March 2017 Mr Burn went on annual leave with a return to work date of 4 April. During his absence Mr Miller attended the Newark showground and was informed by the Chief Executive of the showground that the safety certificate was still outstanding. At that time Mr Miller had not seen the exchange of e-mails referred to above. Mr Miller's evidence which in this case I do accept was that the Chief Executive threatened to terminate the contract. Mr Miller then took on the task of renewing the safety certificate and it was discovered that a considerable amount of work had to be undertaken prior to such a certificate being issued. Whilst there may be an element of exaggeration in the remedial work that required carrying out, there is no doubt remedial work was required.

15. Mr Burn returned to work on 4 April 2017 Mr Burn and there was a meeting with Mr Miller which is crucial to the determination of this case. It is common ground between Mr Miller and Mr Burn that Mr Miller informed Mr Burn of his meeting with the Chief Executive of the Newark showground and that as a consequence of that he was removing him from the management of that customer. It is also common ground that Mr Miller instructed Mr Burn to concentrate on invoices and debtors.

16. There is however a significant conflict of evidence in that Mr Burn maintains that all of McConnells' main customers were removed from his management save for the management of two smaller customers Eden Hall and Hoare Cross Hall and that that left him with very little work.

17. On the other hand Mr Miller asserts that the only customer removed from Mr Burn's management was the Newark showground.

18. In determining this conflict of evidence I take into account that both Mr Burn and Mr Miller gave credible evidence and were not shaken in that evidence by cross examination. I also take into account the evidence of Ms Near and in particular her paragraphs 7 and 8 in which she states that Mr Jai Verma of McConnells contacted her prior to the County Show in relation to the provision of a generator and Mr Verma indicated that he had now taken over Mr Burn's role in relation to:

> "I am now taking over Steve's work on this and future shows and I (Jai Verma) was to be the future point of contact to McConnells."

That statement however is consistent with either version of events.

19. On this point I prefer the evidence of Mr Miller because I am satisfied that at that point he wished Mr Burn to remain in employment and given that McConnells are a relatively small enterprise it would have been a waste of resources to have deployed Mr Burn to such a restricted role as that which Mr Burn alleges.

20. Mr Burn further asserts and I accept his evidence on this point that there were occasions where he had to ask Mr Verma who was junior to him both in experience and years for the allocation of labour. I do also accept Mr Miller's evidence that that largely arose because Mr Burn would not attend the weekly meeting regarding the allocation of labour. I note that Mr Burn asserts that that meeting was largely concerned with MEC's business which was larger than McConnells. However I accept that he should have attended.

21. On 15 May Mr Burn met Mr Miller for the first time since their meeting of 4 April. It was Mr Burn's intention to resign and he had with him a letter of resignation. It is common ground that Mr Miller refused to accept the resignation and that he intended Mr Burn to stay on as a longstanding and valued member of staff.

22. They met again on the next day and it is likely that Mr Miller informed Mr Burn that he could have brought disciplinary charges in relation to the Newark showground event but had chosen not to do so.

23. On 2 June the two met again and Mr Burn produced a letter of resignation. It is common ground that Mr Miller suggested that they await the return of Mr McConnell the other Director from holiday.

24. Mr McConnell returned on 8 June and the three Directors met. Mr Burn tendered his resignation by way of a letter at page 60 which is dated 2 June 2017 and reads as follows:

> "Dear Dave and Pat,
>
> Following decisions made with regard to my role without my knowledge whilst I was out of the country on annual leave, our recent discussions and the resulting circumstances I now found myself in, I am unable to continue in my role as Director of McConnells Electrical Services Limited.
>
> I feel I have no alternative but to tender this letter as my resignation with immediate effect."

In turn Mr Burn was handed the letter from McConnells at pages 61 to 63 which accepted the resignation and amongst other things placed Mr Burn on garden leave with full salary and contractual benefits up to the final date of employment of 30 August 2017.

Conclusions

25. I begin with the oft quoted judgment of Lord Denning in **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221 as follows:

> "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 the employer's conduct. He is constructively dismissed."

26. I raised with the parties the judgment of Lord Hoffman in the case of **Johnson v Unisys** [2001] ICR beginning at page 480 and in particular at paragraph 37 of Lord Hoffman's judgment which in part reads as follows:

> "Any terms which the Courts imply into a contract must be consistent with the express term. Implied terms may supplement the express terms of the contract but cannot contradict them."

27. Mr Martin in his lengthy and helpful submissions at paragraphs 22 to 30, in my view accurately sets out the current state of the law. Applying authorities such as **United Bank Limited v Akhtar** [1989] IRLR at 507 and citing Lady Hale in **Geys v Societe Generale** [2001] AC 523 that the term of trust and confidence is implied by law as a necessary incident of the relationship unless the parties have expressly excluded it.

He goes on to argue, in my view correctly, that the express term namely that quoted above in paragraph 6 must be read so as to comply with the implied obligation of trust and confidence. Thus it is necessary to determine whether there has been a breach of the well-known implied term of trust and confidence. If there has been such a breach then that breach is a repudiatory breach entitling Mr Burn to regard the contract as at an end.

28. That implied term is:

> "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 trust and confidence between the employer and employee."

I agree that the test of whether there has been a breach of the implied term is an objective one.

29. I accept Mr Martin's submissions that this is a case which turns upon whether McConnells acted with reasonable and proper cause in determining without consultation to withdraw Newark showground from Mr Burn's responsibilities, otherwise there will be a breach of the implied term of trust and confidence.

30. Although I have outlined in my findings of fact that I accept that there were genuine concerns, other than those relating to the Newark showground about Mr Burn's performance, nonetheless it was clearly the Chief Executive's meeting with Mr Miller in March 2017 which was both the trigger and the main reason for the reduction in Mr Burn's role. Whether there was a contractual responsibility on McConnells to provide the requisite safety certificate is not determinative. There is no doubt that there was a threat of the loss of the contract which would have a major impact on McConnells. The e-mail trail referred to above shows that in Mr Wylds's words, Mr Burn was indeed stalling this major customer on the issue of the safety certificate. I do not accept that Mr Burn told outright lies as advanced by Mr Miller but he clearly failed to take responsibility for something which in my view having regard to his description of his role he was responsible for.

31. This is a case about responsibility. Mr Burn complained when the level of his responsibility is reduced but appears unwilling to take responsibility in relation to the Newark showground. He should have dealt with the request for the certificate and it is disingenuous of him in cross examination to blame Mr Wyld for the failure. In relation to the faults that were found, Mr Burn's blames the electricians involved. On his own evidence however he was responsible for the overall carrying out of the contract as between McConnells and the Newark showground. Again when it comes to his responsibility in relation to debt he implied that such was beneath him despite the fact that it was one of his responsibilities.

32. Mr Martin in his submissions sets out a number of different ways in which the same result could have been achieved. That may well be so but the question is whether it was reasonable for McConnells to act as they did, tested by an objective standard. In my view they did and I therefore conclude that they acted with reasonable and proper cause arising out of Mr Burn's own conduct of the Newark showground contract. Mr Burn's claim must therefore fail at that point.

33. I will however determine the other two matters necessary purely in relation to constructive unfair dismissal.

34. I accept Mr Burn's evidence that he resigned as a consequence of the diminution in his duties communicated to him without consultation on 4 April 2017.

35. As to affirmation Ms Hindmarch cites the case of **Cochran v Air Products Plc** UK EAT 38/14 which is reported at 2014 ICR at page 1065. Mr Martin however correctly points out that in that case the employee was offering additional performance over and above the contractual notice that he was required to serve. In this case whilst there is a dispute as to whose idea a period of garden leave of 3 months was, it is plain that that period of garden leave was agreed between the parties. In my view therefore Mr Burn's action in serving his notice is not affirmation of the contract. It was by mutual agreement with benefits arising to both sides as a consequence. I would therefore have found that Mr Burn did not affirm the contract by serving 3 months' garden leave.

Wrongful Dismissal

36. Given that Mr Burn was paid his contractual notice pay albeit whilst being restricted to garden leave, I also dismiss the claim of wrongful dismissal.

37. It follows from the dismissal of both claims that the remaining matters on the list of issues become redundant and it is not necessary for me to determine them.

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Employment Judge Blackwell

Date: 26 July 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 July 2018

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FOR EMPLOYMENT TRIBUNALS