



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE TRUSCOTT QC

BETWEEN:

Mr J Haffar

Claimant

AND

IBM United Kingdom Limited

Respondent

ON: 19 and 20 July 2018

Appearances:

For the Claimant: In person

For the Respondent: Ms Olivia Dobbie of Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

PRELIMINARY

1. The claimant has bought a claim for constructive unfair dismissal. He relies on an alleged breach of the implied duty of mutual trust and confidence by the respondent.

2. The claimant gave evidence on his own behalf and represented himself. The respondent was represented by Ms Olivia Dobbie, barrister, who led the evidence of Forrest McDowell Palmer Jr, Peter Anthony Zimmer, Tracey Ann Webster, Robert Lawrence Giles. Ms Webster gave evidence in person, the remaining witnesses for the respondent gave evidence by video link.

3. There were two volumes of documents to which reference will be made where necessary.

ISSUES

4. The issues for the Tribunal were:
- I. Did the respondent commit a repudiatory breach (or breaches) of contract? In particular, did the respondent:
 - a) Conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the claimant when it:
 - I. Transferred the claimant into the Analytics team on 1 January 2017?;
 - II. Required the claimant to work on different technology (DFM instead of ASUMs) following the transfer?; and
 - III. Provided some ASUM work to another employee (Tom Huppert) in May 2017?
 - b) If so, were those acts done without reasonable and proper cause?
 - ii. If so, did the claimant affirm the contract and waive the breach(es) before he handed in his notice of resignation on 28 September 2017?
 - III. If not, was the claimant's resignation on 28 September 2017 in response to the alleged breach(es)?
 - iv. In all the circumstances of the case, did the respondent act reasonably or unreasonably, within the meaning of s.98(4) ERA?
5. The hearing was scheduled to address merits and remedy but due to shortage of time only the merits were addressed.

FINDINGS OF FACT

6. The claimant's employment commenced 1 January 2009 and his employment transferred to the respondent following the acquisition of Cognos [78-91]. His contract with both Cognos and the respondent contained a clause which referred to flexibility in duties [73] and [79].

7. At the time of transfer, the claimant's job title was Consultancy Manager [73]. During his career at Cognos and IBM, he worked in variety of different roles, including:

- a) Practice Manager (UK) (Cognos) [811B]
- b) Services Development Manager Global Services (Cognos) [808]
- c) Business Development Manager Northern Europe (Cognos) [808] and [811B]
- d) Consultancy Manager (Cognos) [73]
- e) Services Development Manager, World-wide Professional Service and Education (IBM) [811B]
- f) Manager FPM Competency Centre (IBM) [811B]
- g) WW IP Assets & Methodology Programme Manager [808]

8. When the claimant joined Forrest Palmer's team, in Analytics in late 2010/early 2011, he estimated that he was spending about 60% of time on CSIMs (Cognos methodologies), 20% of project management mentoring and 20% on "bits and pieces" [811C].

9. The claimant's role changed over time, not only in respect of the methodologies he produced, but also in respect of the software which he was making methodologies for. The methodologies changed from CSIM (Cognos products) to BASIM (when the portfolio of methodologies was expanded to include other business analytics products) to ASUM (when the portfolio broadened further still, such that they were not exclusive to business analytics) [811C-E].

10. The claimant's role also changed in other ways. The changes are apparent from the notes of interview in late 2010 [811C], the job description written some time before 2014 [811D] and the summary the claimant produced in January 2017 [207].

11. In late 2016, Forrest Palmer's team (including the claimant) was moved to a different unit called Watson Financial Services. However, shortly thereafter, the claimant was transferred back to the Analytics business unit.

12. This move was effected following a series of discussions the claimant had with Forrest Palmer (his then manager) on 3 January 2017, Peter Zimmer (a manager in Analytics) on 6 January 2017, 9 January 2017 and 23 January 2017 and Lynn Lawton (another manager in Analytics) on 13 January 2017.

13. Forrest Palmer first suggested the move back to the Analytics business unit due to the fact that the majority (75%) of downloads of ASUMs related to products held in Analytics, or to products which were shortly to be transferred to Analytics, namely FOPMs. As a result, Mr Palmer considered that it was likely that the ASUM programme which the claimant managed would continue in the Analytics business unit. In his discussion with the claimant on 3 January, Mr Palmer was clear that there would be no ongoing need for ASUMs in his department, namely WFS.

14. Mr Palmer could not and did not assure or guarantee the claimant that the ASUM programme would be continued in Analytics as he had no control over what work the Analytics Business Unit might wish to continue or phase out, nor did he have any power over the business decisions of the Analytics Business Unit, its strategy or its priorities.

15. The claimant had a discussion with Peter Zimmer on 6 January 2017, during which Mr Zimmer informed him of the work he envisaged would be done in the newly-created team and informed him of the two roles he had available as Service Offerings Managers. Mr Zimmer asked the claimant to indicate his interest in either role. Peter Zimmer did not at any time suggest ASUMs would form part of the work he would do in the new team. He also accepted that the roles and structure of the new team were still being decided upon and that it was a new initiative. Mr Zimmer did not actually know what ASUMs were at the time of his discussions with the claimant [522]. Thereafter, Peter Zimmer sent the claimant a slide deck which contained the proposals for the new team [216-224]. There is no mention of ASUMs in that deck, but there is mention of DFM, namely the Data First Method, which is a different type of methodology with which the claimant had not been involved. The claimant wrote back to Peter Zimmer "this is great. Looking at slide

4... I would say Patterns and/or Partners Ecosystem could be of interest to me..." [213]. Slide 4 referred to page 222 on which there is no mention of ASUMs and the only methodology referred to is DFM.

16. The claimant had a further discussion with Peter Zimmer on 9 January 2017 [225] and wished to introduce him to the concept of ASUMs by sending him another slide deck [227-248]. The claimant explained the synergy between ASUMs and the DFM methodology [236].

17. On 13 January 2017, the claimant had a discussion with Lynn Lawton who was a manger in Mr Zimmer's new team, working on the new initiative. The claimant expressed to Mr Lawton his interest in the role doing Patterns and/or Partners and stated to Mr Zimmer (in an email afterwards) "I appreciate it could take time and effort to gather a team and bring your vision into reality. So let me know if I can help on this front. Let me know the next step..." [255]. He also expressed his desire to proceed with the move to Mr Zimmer's team in Analytics.

18. On 23 January 2017, the claimant had a third discussion with Mr Zimmer, in which he indicated his desire to move forward with the role of Solutions Patterns. In the agenda attached to the digital invitation which the claimant sent to Mr Zimmer in respect of the call, the third bullet point was "determine the next step for me to join your team" [259].

19. Peter Zimmer envisaged that this role (once the team was fully up and running) would entail deployment and use case development, which was similar to the role the claimant did with ASUMs, deploying analytics methodologies.

20. The next day, the claimant informed his then line manager, Dominic Myles that he wished to confirm the transfer to Mr Zimmer's team [261].

21. After the move to Analytics in January 2017, the claimant commenced working with his new team and his engagement with the team can be seen from the documents 260, 268, 274, 278, 327, 340, 342-5, 346-7, 348-352, 358-9, 360-1, 363-4, 366-7, 368, 387, 389-390, 394-6. The claimant was also assigned to work under Mr Lawton, who was to act as his buddy to help upskill him on DFM [327].

22. On occasion, the claimant complained about the lack of definition of his role and job title, including on 24 January 2017 (the date he agreed to take the new role) [332] and 15 February 2017 [331]. In neither complaint did he suggest he had inadequate workload to fill his time. The claimant's next complaint was on 24 March 2017 [354-5]. In his email, he raised the issue of lack of clarity about his role and the workload. However, he did not raise a formal complaint at that time. He continued with the role and continued to engage with his team.

23. The claimant continued to work until 22 May 2017 when he raised formal grievance [398]. The trigger for the grievance was the claimant hearing from Tom Huppert that Mr Huppert had been asked to work on ASUMs. At the time, he believed that Mr Huppert was taking over (or resurrecting) the entire ASUM programme. The claimant later understood that Mr Huppert was only ever intended to spend about 20% of his time on ASUMs and that the project would not continue beyond October.

24. The claimant decided not to remain in the employment of the respondent after speaking to Mr Huppert. This is evidenced by the terms of his grievance [399] and various communications thereafter. Indeed, in the informal grievance discussion on 8 June 2017, during which Dominic Myles and Peter Zimmer sought to address the claimant's concerns and discuss ways to change his role, the claimant requested his "exit options" [420 and 428]. Mr Myles noted after the meeting that: "it has gone too far in Jason's mind. It doesn't matter if Peter offers a fantastic role, or Jason Silvia prioritises ASUM, Jason has lost trust and wants to leave" [428]. The claimant referred to constructive unfair dismissal during that meeting [428].

25. In an email to Mr Lawton on 8 June 2017, the claimant stated "I shall be leaving IBM...I lost some confidence and trust and I feel I cannot carry on working at IBM" [425].

26. In the claimant's first communication with Tracey Webster, who was investigating his grievance, before he had met her, he stated he would like to know "my IBM leaving options" [503]. Ms Webster recorded this as his objective in her grievance outcome report after having met with the claimant [552]. In her contemporaneous notes of the meeting on 30 June 2017, she recorded the claimant as having stated: "feels cheated, has no trust in the system" [496], "wants to understand exit options... JH does not wish to stay in current job..." [497].

27. As part of the grievance investigation, Ms Webster ascertained what the position was in relation to Mr Huppert. She found that "the previous functional upline manager advises that this is a very small amount of work, insufficient to seek 'buy back' of the employee's time, and does not envisage any increase in volume of ASUM work in the near future" [576]. In the grievance outcome, Ms Webster suggested that the claimant be assisted in applying for new roles on the respondent's recruitment site [555].

28. The claimant did not seek to take up the suggestions made by Ms Webster to resolve the matter, he appealed. In his appeal, he re-iterated his desire to leave and alleging "failure to follow ERA legislation" and breach of "trust and confidence" [556]. The following day, he informed Robin Smith "I shall be taking the matter to ACAS and industrial tribunal if we cannot solve it amicably" [557].

29. The claimant reiterated his desire to leave at the grievance appeal meeting on 31 August 2017 [619] and thereafter "downed tools" by declining meetings (including a meeting to discuss his career) at page [679] stating "My plan is to leave IBM so this would not be relevant" [683].

30. The appeal outcome also recommended that the claimant be supported to identify a suitable alternative role [754] but the claimant responded to this by resigning [761].

31. The claimant continued with his role from 12 May 2017 when he learned from Mr Huppert that he was doing ASUM work until 27 October 2017 when his notice expired.

SUBMISSIONS

32. The Tribunal heard submissions from both parties, without intending any disrespect, these submissions are not repeated here.

LAW

Term of the contract

Implied agreement to vary contract

33. It is important to distinguish between affirming the contract following a fundamental breach and agreeing, by implication, to a variation in terms. In the former case there is no question but that a fundamental breach of contract has occurred. In the latter case there is no breach of contract at all.

34. Where a change in terms and conditions takes immediate effect, and the employee continues working without protest, it is more likely that their actions will be deemed to amount to agreement by conduct than if the change did not have immediate effects according to the EAT in **Jones v. Associated Tunnelling Co Ltd** 1981 IRLR 477.

35. The test of whether there has been a repudiatory breach of contract is an objective one, see **Leeds Dental Team Ltd v. Rose** 2014 ICR 94 EAT.

36. Once an employer has breached trust and confidence that employer may not unilaterally repent and withdraw its actions, thus leaving it up to the employee whether or not still to leave and claim constructive dismissal, see **Buckland v. Bournemouth University** [2010] IRLR 445, CA.

37. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v. Sharp** [198] ICR 221 CA, the employee “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”. An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. There comes a point, however, when delay will indicate affirmation.

38. In **Kaur v. Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978 the Court of Appeal listed five questions to ask in order to determine whether an employee was constructively dismissed:

- 1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- 2) Has he or she affirmed the contract since that act?
- 3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- 4) If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju** [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

5) If so, did the employee resign in response (or partly in response) to that breach?

39. In respect of 'last straw' cases, in **Waltham Forest v. Omilaju** [2005] ICR 481 CA, in which the Court of Appeal gave the following guidance:

- 1) The final straw must contribute something to the breach, although what it adds might be relatively insignificant, it must not be utterly trivial.
- 2) The act does not have to be of the same character as earlier acts complained of.
- 3) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
- 4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

40. An employer's repudiatory breach does not bring the contract to an end automatically, the contract is not terminated until the breach is accepted by the employee, **Société Générale, London Branch v. Geys** [2013] ICR 117 SC.

41. To establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. In **Nottinghamshire County Council v. Meikle** [2004] IRLR 703 (applied by the EAT in **Abbycars (West Horndon) Ltd v. Ford** UKEAT/0472/07) the Court of Appeal held that the resignation must be in response to the employer's repudiation. It need not be the sole reason, but it must have "played a part" in their leaving.

42. If a constructive dismissal is established, the issues of reason for dismissal and reasonableness of dismissal apply.

DISCUSSION and DECISION

43. The respondent did not commit a breach or breaches of the implied term of trust and confidence when it transferred the claimant into the Analytics team on 1 January 2017, nor when it required the claimant to work on different technology (DFM instead of ASUMs) following the transfer nor when it provided some ASUM work to another employee (Tom Huppert) in May 2017.

44. The Tribunal finds that the respondent's actions were not calculated or likely to destroy or seriously undermine the trust and confidence between the parties. The evidence of the respondent's witnesses was genuine and credible. There was no evidence that what occurred was other than quite usual for the respondent which would have been understood by the claimant. All four of the respondent's witnesses gave evidence that fluidity / flexibility in respect of job titles and duties was custom and practice within IBM and/or in the technology sector more broadly, due to the changing nature of technology. This is evidenced by the number of re-organisations which took place within a short space of time, and also in respect of how various of those involved in the events had their roles, teams and departments change over the material period.

45. The move of department (from WFS to Analytics in January 2017) was made by Mr Palmer in good faith and on the basis of sound data (data which the claimant himself had collated). In the original complaints raised by the claimant about his role and the change of department, *he did not put his case as high as stating that Mr Palmer had assured or promised him that the ASUM programme would transfer. Rather he stated "I was under the impression... that I was going to apply my ASUM programme to Analytics..." [355] and, in his own grievance, that he was "led to believe my ASUM programme would transfer..." [398].* The Tribunal accept Mr Palmer's evidence in this regard.

46. By the date on which the claimant was transferred out of WFS back to Analytics he had been working on ASUMs for 2 years. There is no contractual document (or even a job description) which specifies that the claimant's role is exclusive to ASUMs. The very fact that the claimant needed to send Mr Zimmer an "introduction to ASUMs" reinforces the fact that Mr Zimmer had not indicated any desire or intention to continue the ASUM programme. The new team saw no use for ASUMs and offered him a different role which was entirely reasonable in the circumstances. There was a mutual variation to the claimant's duties which he actively engaged in. He voluntarily accepted the offer of the new role, in full knowledge that it did not involve a continuation of the ASUM programme.

47. Whilst there was delay in confirming job titles and job descriptions, there was no breach of the implied term of trust and confidence. Nor is there a breach of an express term because the claimant's contract expressly permits the changes which the claimant relies on as amounting to a breach [73]. The Tribunal was alert to the possibility that the respondent might be so organising its business to be rid of the claimant but the Tribunal is satisfied that this is not the case.

48. The claimant had worked in the new team for approximately 4 months by the time he raised a complaint, triggered by finding out about Mr Huppert's work on ASUMs. The claimant said during cross examination that this was the last straw for him. The Tribunal does not accept that there had been any previous acts by the respondent which undermined the implied term of trust and confidence in the contract of employment.

49. The claimant had no intention of remaining and seeking to resolve his concerns, he simply wished to leave with a severance payment. The claimant stated in his grievance that he did not want to be moved into a new role "at this late point in my career" [398]. He can only have meant that he sought a settlement payment as the "amicable" resolution, since he had already rejected Mr Zimmer's suggestion to redesign his role and Ms Webster's proposal that he be supported in finding a suitable alternative role. The claimant did not suggest any other alternative outcome or resolution.

50. If the Tribunal had found that there had been a material breach of contract by the respondent in transferring the claimant to Analytics or having him work on DFM, the Tribunal would have concluded that the claimant had accepted the variation because of the time he worked in the new role. The issue of Mr Huppert carrying out ASUM work was not in itself contended to be a breach simply a last straw. The solutions suggested by the respondent in the grievance procedure could not have cured any breach if there was one but the Tribunal finds that there was no breach or if there was it was accepted. The resignation was not caused by any act of the employer. If the Tribunal had concluded that the claimant was

dismissed, the respondent's actions in moving the claimant was an SOSR, the reason being business re-organisation and its actions in deploying the claimant to another role within his skillset was reasonable in all of the circumstances.

62. The claimant's claim of unfair dismissal is dismissed.

Employment Judge Truscott QC

Date 14 August 2018