



EMPLOYMENT TRIBUNALS

Claimant: ANTON REYNOLDS

Respondent: HERON FOODS LIMITED

Heard at: Hull

On: 10th October 2018 (and 12th
October in Chambers)

Before: Employment Judge Eeley (sitting alone)

Representation

Claimant: In person

Respondent: Mr I Steel (solicitor)

RESERVED JUDGMENT

The Claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Background

1. By a claim form presented on 17th June 2018 the claimant brought a claim of constructive unfair dismissal arising out of his employment with the respondent. The claim was defended in full by the respondent. The matter was listed for final hearing before the Hull Tribunal on 10th October 2018.
2. I received written witness statements on behalf of the claimant and the respondent's witness Mr Simon Prior (Regional Manager) and they gave oral evidence before me. I was also referred to an agreed bundle of documents (running to 308 pages). I read the documents to which I was referred by the parties. I was grateful for oral submissions on behalf of both parties.

3. In deciding the claim the following legal issues potentially arise for determination:
 - a. Was there an act or series of acts by the respondent which amounted to a fundamental breach of contract? The claimant contends that the respondent breached the implied term of mutual trust and confidence.
 - b. If the respondent did breach the contract did the claimant resign in response to that breach?
 - c. Did the claimant affirm the contract following the breach?
 - d. If there was a constructive dismissal was it for a potentially fair reason within the meaning of section 98 Employment Rights Act 1996?
 - e. If so, was the dismissal fair within the meaning of section 98(4) of the Employment Rights Act 1996?

Findings of fact

4. The respondent is food retailer that specialises in frozen food. It has approximately 260 stores nationwide and its head office is in Hull. The claimant was employed on 11th April 2011 as a manager of the respondent's Whittlesey store. From March 2016 the claimant was promoted to Area Manager "Designate". He was subsequently made permanent in the Area Manager role. On 29th March 2017 the claimant was provided with training as set out in the Area Manager Designate Learning Log (page 162-168) and the Area Manager Performance and Competences Review (page 169-178).
5. In July 2017 the claimant relocated from the Midlands area to Barry in South Wales. From July 2017 the claimant oversaw two stores, namely Bridgend and Cwmbran. All other Area Managers in the region oversaw between thirteen and fifteen stores. The Bridgend store opened in July 2017 and Cwmbran store opened in September 2017.
6. Simon Prior was employed by the respondent on 14th November 2017 as Regional Manager for the South West region which includes Shropshire, Staffordshire, East and West Midlands, Coventry, Birmingham, Worcestershire and South Wales. The claimant and four other Area Managers reported to him.
7. Shortly after Mr Prior started in his role he held a team meeting with his Area Managers including the claimant. This took place on 4th December 2017. The purpose of the meeting was for him to introduce himself and to establish his working relationship with the Area Managers for the future. Not long after he undertook personal visits of all the stores in his region (circa 59 stores in total).
8. On 12th December 2017 Mr Prior visited the Bridgend and Cwmbran stores with the claimant for the first time to see what the stores were like so that he and the claimant could understand the challenges going forward. He 'walked the stores' in detail with the claimant, spoke to colleagues and engaged with them and identified any issues. He noted gaps in products, missing 'point of sales', lengthy queues and overall drew

the conclusion that the stores looked “very unloved”. He concluded that the stores were not in great shape and he agreed various actions with the claimant to move them forward. He discussed key indicators about the management of the store including missing SEL’s, shelves with many out of stock promotions, poor hygiene levels, warehouses and chilled and frozen backups being in a poor state of organization, the offices being untidy, low stock levels of fresh and chilled foods and poor hygiene levels in the toilets and canteens. I accept that he raised these concerns with the claimant in a constructive and non-aggressive manner.

9. On 29th December 2017 Mr Prior visited the Cwmbran store with the claimant. The primary purpose of his visit was to conduct interviews for new staff. He again discussed with the claimant various issues with the store including the low level of fill, gaps on the shelves, poor merchandising etc. He explained to the claimant that the stores were below standard. The claimant agreed that standards were not right and gave assurances that it would improve.
10. On 2nd January 2018 Mr Prior visited the Cwmbran store with the claimant again. Once more his primary purpose was to interview staff but he noted similar issues with the store as he had picked up in the previous two visits. He ‘walked the store’ with the claimant, notebook in hand, and discussed and agreed points of action. Mr Prior’s purpose was to build up the stores as he felt that the new stores were failing. It was apparent that the agreed actions had not resulted in the required improvements. He explained to the claimant that the stores were below standard and that now Christmas was over standards needed to improve in order to improve sales, hygiene and compliance both legally and from a company perspective.
11. On 12th January 2018 Mr Prior had a meeting with staff and set out his vision for 2018. The claimant was in attendance.
12. On 25th January 2018 Mr Prior was contacted by his colleague Andy Wise who had carried out a “WISH” visit at the claimant’s store. “WISH” stands for “Would I Shop Here?” and is effectively a performance audit of a given shop. The respondent’s Managing Director determines when and where a WISH visit should take place. The visit to the claimant’s store had uncovered problems and Andy had spoken to the claimant about these. The claimant was not pleased with the feedback. Andy Wise took Mr Prior through the visit and identified the problems such as products being out of date by more than 6 weeks, missing SEL’s etc.
13. On 26th January Mr Prior was scheduled to visit the store in any event for a planned visit. Mr Prior wanted to discuss the KPI reports that he had received. Those reports were to be found pages 68-85 of the bundle. The figures showed that the claimant’s stores had achieved the lowest average spend in the region. They also demonstrated that although the claimant had only two stores he was well over ‘budgeted staff hours’ when compared with other Area Managers. There were also statistics setting out ‘reduced to clear’ against wastage/spoilage. The benchmark was that 70% of goods should be reduced to clear with only 30% going as waste/spoilage. The claimant’s statistics showed that only 32.29% of goods were going to ‘reduced to clear’ with the remainder of over 60%

being lost as wastage/spoilage. There were similar problems with stock result performance taken as an overview. Large amounts of stock were unaccounted for and were not counted either as wastage or reduced to clear items. The overall picture painted by the statistics was that the claimant's stores were the worst performing stores within the region.

14. During the visit on 26th January Mr Prior reviewed the stores himself and tried to understand the reasons for the problems which had been identified. He wanted to coach the claimant to see if he could improve the stores' performance. For example, he physically showed the claimant how to display products and merchandise promotions. Once again, he walked the stores with the claimant. He also reviewed the WISH visits with the claimant and the poor results which had come out of them. Those audits were backed up with text and pictures of the poor standards.
15. After walking the stores with the claimant Mr Prior's meeting to review performance of the stores took place in the Bridgend manager's office well away from public gaze. Mr Prior asked the claimant why the stores had deteriorated and the claimant was defiant about the WISH visit. He did not believe that the results were as bad as Mr Prior did. However, after further discussion the claimant said, *"Well I have been lazy haven't I and it's not good enough, I realise that now"*. Mr Prior said to the claimant that these were the claimant's words and not his. It was the claimant who was using the word 'lazy.' After reviewing the visits in detail, the claimant accepted that standards were not good enough. They exchanged views on how the stores had got into that state and what was required going forwards. Mr Prior felt that although the claimant claimed he was working hard he could not really demonstrate to him what he had been doing. The claimant in fact went on to say that he had personally managed the stores. In Mr Prior's view this made the claimant's position worse as there were store managers employed to run the stores whereas the claimant's role was to oversee the store managers and ensure standards. The claimant had failed to resolve previously identified issues and when asked he explained that he hadn't had time but would get around to it in the future. During the discussion the claimant agreed that the report was unacceptable but had no explanation as to why the stores were in such a poor state. Mr Prior pointed out his concerns about the two stores and their lack of performance over the previous 7 months. The claimant's response was, *"Well I have been lazy haven't I and it's not good enough I realise that now."* He said, *"I've been lazy and not done things."* Mr Prior said to the claimant that these were his words and not Mr Prior's. He did go on to say that it was unacceptable and that the claimant needed to understand that this was not the behavior expected of an Area Manager particularly taking into consideration the fact that he had only two stores to oversee. He asked the claimant how he would cope if he had the number of stores which other Area Managers had to contend with. The claimant agreed that he would be unable to cope with that number of stores.
16. On 26th January Mr Prior visited both of the claimant's stores with him and spent several hours at each walking the floor, making active suggestions, and reviewing performance in private in the office. The same or similar problems were identified in both stores. The claimant realized that standards were unacceptable, said that he had been lazy and that this

was a prompt that he needed to get things moving. Mr Prior told the claimant that he would give him time to resolve the issues but would be back on 7th February to review progress. This was would be a planned visit and not an attempt to 'catch the claimant out'. The claimant gave assurances that things would improve. Mr Prior said to him that he needed to "show his Spurs" and "up his game". Mr Prior asked if he needed additional help or support from him or from any of the other members of the team but the claimant declined this assistance.

17. At the end of the meeting the claimant disappeared for a few minutes and came back into the office with a cup of tea and a pie for Mr Prior. Mr Prior thanked him and offered to pay for it but the claimant said no, *"it's the least I could do taking into account the state of the stores."* Mr Prior said *"we are all rowing the same boat all we should want is better stores to get customers coming back."*
18. The follow-up visit took place on 7th February. Once again Mr Prior and the claimant looked around both stores in detail. Mr Prior was pleased to see that the claimant seemed to have started to get things moving and the standards in both stores had significantly improved from the previous visit. There were still additional points which needed addressing but in the main there was an improvement. The claimant said, *"well I can see now I have been lazy and can see I need to pull my socks up."* Mr Prior thanked him for his input and asked him to keep it up and pointed out that he needed to see continuous improvement in both the stores.
19. On 10th February 2018 the claimant telephoned Mr Prior to update him on sales and how the stores were looking. The conversation was calm and there was no shouting or anger. The claimant assured Mr Prior that standards had been maintained. After discussing sales Mr Prior asked the claimant about a stock-take that the claimant had done in Walsgrave. This had been drawn to Mr Prior's attention because it had gone badly. Mr Prior had been told by Andy Wise that stock had not been checked properly and an inaccurate count had taken place. Rather than carrying out a full check the claimant had only checked certain lines within the store. He had had problems printing off a report but should have been able to use a tablet computer on the shop floor to carry out a full check. When Mr Prior questioned the claimant about what had happened the claimant was evasive. He told Mr Prior that he had checked some lines by running backwards and forwards from the office to the shop floor when in fact the PDF was available on his laptop to check this on the shop floor. When Mr Prior asked him why he had not done this or even got the stock printed at another store he told Mr Prior that he had made some good points and that he had not thought of these. Mr Prior ended the conversation by telling the claimant that given that they were due to meet shortly they could discuss it face to face at that later date. Mr Prior did inform the claimant that he was not happy about this or about the fact that he had only been told about it by another member of staff. Mr Prior was due to speak to the claimant the following Monday and have a face-to-face meeting with him on Tuesday at the regional meeting so there would be an opportunity for him to get a proper understanding of what had gone on at that point. The claimant asked Mr Prior if he wanted him to do another

stock take to sort out the problem but Mr Prior said that there was no point. This was the last communication between Mr Prior and the claimant.

20. On 11th February 2018 the claimant emailed Fiona Dawson of HR (page 279). The text of the email was as follows:

“Over seven years I have worked for Heron foods, I have worked my way up the ranks to the position of area manager. I have always worked hard and tried to improve stores, standards and sales. I have never had a day off sick. I gave up everything to go to Wales and show the company I was dedicated to Heron and my job. I now feel that I am being bullied out of a job which I have loved doing. With my previous meeting with Simon Prior I was threatened with my job no less than six times, I was swore at, I was told that I was not an area manager not even a store manager and he didn't want me in region C. I was told I was lazy and had probably been sat at home for the last six months or sat in the office on my phone all day. I was told he was going to check my phone records and get Andy Wise to review CCTV to see what I have been doing. My stores were apparently the worst in the company and I was not fit to be an area manager. I was told I would not be opening Merthyr another area manager would be opening it. With this constant threat hanging over me I feel I cannot fulfil my role, I think this sort of behavior is unfair, unprofessional and constructive. With another area manager reporting the same things happening to them, with my health starting to suffer and with not being able to sleep through worry and stress. It is with a heavy heart I am forced to give up a job I dearly loved doing, I therefore give 12 weeks' notice of my position with the company before I am forced out. I wish the company and the area all the success in the future. I am self certificating myself this week and going to see the Doctor to see if he can prescribe me some medication to help me. Yours sincerely...”

21. On 12th February Simon Prior was notified by the Managing Director that the claimant had resigned.

22. On 12th February 2018 Simon Prior received a telephone call from the East Midlands Area Manager stating that the claimant had announced that he was leaving work and was off sick. The claimant then contacted the store whilst off sick on 13th February to advise them that the stock-take due that day may be cancelled because he was off sick. He was also contacting other people at the store suggesting that he had resigned. Simon Prior had a genuine concern that the claimant would continue to speak to staff and continue to unsettle them and wanted this to stop. He therefore took the decision to block the claimant's work phone and email accounts.

23. Simon Prior took the decision to cease the claimant's access to work emails. He did this once he had been informed of the claimant's resignation and the fact that the claimant was signed off sick. I accept Mr Prior's indication that this is his standard practice when an employee leaves and has access to confidential information that can be used by a competitor. I accept that he has always done this throughout his career to

protect his employer. I accept that he had particular reason to do this in the claimant's case as he had been contacted by one of his other area managers and was informed that the claimant had contacted a member of staff at the store to tell them that their stock-take was going to be cancelled as he was now leaving and he had been allocated the stock check that store. Had the manager not contacted the Area Manager after the claimant's phone call the stock-take would have been aborted and missed. So, it was evident that the claimant was acting incorrectly and interfering with the smooth running of the business even though he had signed himself off sick and had resigned. Mr Prior had also had a previous bad experience when a colleague had left earlier in January but had siphoned off company information and sent it to his own email account.

24. A few days later on 16th February the claimant sent a further email to Fiona Dawson of HR (page 280) which stated:

"Unfortunately I feel unable to work out my notice period, I feel so stressed and unwell it has also affected my confidence which has a massive effect on me. I am ending my employment with Heron Foods with immediate effect. I feel my grievance has not been dealt with and has been dismissed. I feel I have been treated unfairly and Simon Prior's behaviour and conduct is unprofessional, degrading and unfit for someone in his position, this has not been made a confidential matter as other members of staff are aware of my situation and I have had senior members of management phoning me saying that they have been told that I am leaving the company. This only leads me to believe you no longer want me to continue working for Heron foods, my laptop and company phone has been blocked this is unfair due to as no other employee from Heron foods which has been in my position has had this unfair treatment. I will return all company property to the Bridgend store, I believe Kelly Liddle and Hew Crowley are in the store I will hand these over to them. You have breached your own company policies in dealing with the above, grievance policy, bullying and harassment, confidentiality, other policies have been breached with defamatory comments made to staff i.e. myself by Simon Prior, I also believe this is constructive. My intention now is to speak to my doctors to get urgent help for the conditions I am currently suffering caused by Heron foods. I will be contacting ACAS." (Page 280)

25. Later that same day Fiona Dawson emailed the claimant expressing shock and pointing out that she was not aware that his laptop and mobile been blocked (page 281-282). She stated: *"I have been down to see IT and I'm afraid this was an error; so please go and pick up your things-you are still very much employed by us. I actually sent you an email yesterday (I will forward you a copy) to invite you to a meeting with Tony, Simon and myself to discuss a way forward-the meeting was here at (SSC) on Monday, 19 February 2018 at 3 PM. I was planning to have a separate meeting with you to discuss your issues/grievance either prior to the meeting at 3 PM or afterwards.... Please feel free to call me. I am so sorry that this happened."*

26. On 19th February (page 283) the claimant sent a further email to Fiona Dawson stating that he felt that he had been unfairly treated and

constructively dismissed by the respondent. He mentioned that it had been logged with ACAS and they had advised him to take legal advice on the matter. He said that his grievance had not been dealt with together with bullying and unreasonable behavior with defamatory comments made by employees, breaches of company policy along with unfair treatment. He felt that he had not received any support. He confirmed that he did not wish to attend a mediation meeting and did not think it was appropriate considering it would be with the person he had a grievance with. He also referred to comments allegedly made by Fiona that Tony Dobbs had said that the claimant did not need to work notice and that he wanted him to leave as soon as possible. The claimant proposed a financial settlement as the only solution and gave the respondent 10 days to respond.

27. On 21st February 2018 Fiona Dawson sent the claimant a further email acknowledging his resignation with immediate effect and confirming that the claimant's last working day with the company was 16th February 2018. She also offered the claimant the option of using the modified grievance procedure as he was no longer an employee. She explained that the respondent would look into the claimant's concerns and write to him with a response. She clarified that this was a standard procedure for dealing with issues raised by employees who are no longer employed by the respondent. She also sought clarification of details such dates of meetings and the identities of witnesses so that she could investigate matters further.
28. Following this point in the chronology the claimant instructed solicitors who wrote to the respondent on 22nd February 2018 setting out the claimant's account of what had happened. The respondent replied on 1st March treating the solicitor's letter as a grievance letter together with the claimant's earlier emails. The respondent sought further clarification of the claimant's allegations to facilitate investigation. The claimant's solicitors provided a further response via letter dated 16th March setting out further details of the allegations.
29. The respondent provided an outcome to the claimant's grievance via a letter which is undated but was to be found at page 303 of the bundle. In essence the claimant's grievance was not upheld and it was not accepted that Mr Prior had acted inappropriately or aggressively towards the claimant. Rather, it was found that evidence suggested that he had grounds to raise concerns, probably did so and that the claimant took offence at this even though the concerns were legitimate.
30. Having considered the conflicting accounts of the interactions between the claimant and Simon Prior I prefer the account of Mr Prior where there is a conflict. It is clear that there were legitimate concerns with the claimant's performance in the two stores which he managed. This is corroborated by the data in the KPIs and the outcome of WISH visits conducted by independent members of staff such as Mr Wise. Given the nature of Mr Prior's role he was entitled, indeed obliged, to raise these concerns with the claimant. There is nothing to suggest that he did so in an inappropriate way. Indeed, it appears that his constructive criticism actually bore fruit as the two stores started to improve. Furthermore, it is apparent that the claimant recognized at least some failings in his own performance at the time. He does not appear to have felt that he was

bullied in any way on 26th January as he in fact proffered tea and a pie as a sign of goodwill at the conclusion of that meeting. I do not find that to be consistent with him having been shouted at, bullied or otherwise treated aggressively. If he had been bullied he would have avoided this further contact rather than initiating it. He was explicitly recognizing the shortcomings in his own performance at that point.

31. I also note that the claimant's account of his interactions with Mr Prior has changed over time and become more elaborate whereas Mr Prior's evidence remained clear and consistent throughout. There were marked differences in the complaints made by or on behalf of the claimant in various documents, for example:
- a. At page 279 in his original resignation he states *"I was told I was lazy and had probably been sat at home for the last six months or sat in the office on my phone all day."* By the time his solicitor writes at page 297 Mr Prior apparently says that the Claimant is *"fucking lazy"* and had said the claimant had been *"sat on the fucking beach being a lazy bastard."* There is a marked difference between these accounts.
 - b. The email at page 279 doesn't include the allegation *"you shouldn't be in this fucking job"* whereas the letter from the solicitor (page 297) does. Likewise, the two documents differ in referring to 'home' or 'beach'.
 - c. In the letter at page 298 from the Claimant's solicitors Mr Prior allegedly asks claimant *"what the fuck have you been doing all the time"* and referred to him again as *"fucking lazy"*. There was no mention of this in the email at p279.
 - d. During the course of oral evidence the claimant was inconsistent on a number of occasions in relation to how many times certain comments were made to him by Mr Prior and in which store.
 - e. In the ET1 it is alleged that Mr Prior said *"I would be out of my job in a couple of weeks"*- no such time frame was mentioned in the email at p279
 - f. In the claimant's tribunal witness statement he says that Mr Prior said he was *"fucking useless"*. This is not mentioned anywhere else in letters from the claimant or his solicitor- it is a new allegation.
 - g. In relation to 7th February (p292) the claimant's solicitor alleges that during the meeting Mr Prior was more professional and appropriate but in his witness statement for the hearing the Claimant alleges that Mr Prior said *"you're trying to make me look fucking bad you're an embarrassment to the region and you will be removed. Your shops are shit, wages are all over the place and you haven't got a fucking clue what you are doing and you most likely spend your time sat on your arse or sat on the beach."* In cross examination the claimant explained the inconsistency as being because the solicitor had mixed the dates up (even though the claimant would have approved the letter before it was sent.)

The above are just some examples of the inconsistencies in the claimant's allegations over time which lead me to prefer the evidence of the respondent where there is a dispute of fact.

32. I also note that Simon Prior had legitimate concerns about the Walsgrave stock-take which had been brought to light by a third party. Mr Prior was entitled to raise those concerns with the claimant and was due to deal with them face-to-face had the claimant not resigned earlier. That said, I also accept that Simon Prior had no settled intention of dismissing the claimant at or around the time that he in fact resigned. Whilst he had genuine and legitimate concerns about the claimant's performance in his role he was taking a constructive approach in coaching the claimant to obtain improvements. Indeed, some improvements had already started to take place.
33. I accept that Mr Prior never said to the claimant that he would not remain his job and I note that the claimant did not make any complaint or raise any grievance about Mr Prior's behavior until he had already decided to resign. One would expect some form of complaint or grievance before the claimant took the "nuclear option" to resign from a 7 year career with the respondent for which he had relocated in the recent past. He accepted in cross-examination that he was familiar with the respondent's policies including the grievance procedure.
34. After the claimant had tendered his resignation a further matter came to the respondent's attention. It was reported to the respondent that Georgie Hutton, who was an employee at the Whittlesey store, had been signed off from work sick. During her sick leave she had been witnessed at the claimant's stores apparently working and not in company uniform. Witness evidence and CCTV footage indicated that she had visited each store on about 6 occasions and had come into the store with the claimant, had lunch with the claimant and left with the claimant. It was also indicated that she had had access to confidential information whilst on site. Whilst the claimant denies that she was working during her visits it appears that there was significant evidence to that effect. His explanation is that she had come to visit him whilst she was visiting family in the area and that these were surprise visits. This is apparently not consistent with the amount of footage of her on the premises and the activities that she was seen to be carrying out. In any event the claimant accepted that this was apparently odd behavior by him as an Area Manager and he accepted that it would be wrong to allow her to work at one store when she was signed off from another on sick leave and that this could potentially constitute gross misconduct. When this matter came to light the respondent was understandably concerned that Georgie was effectively working without insurance, had acted deceitfully by telling people she was unfit to work and had assisted the claimant with his Area Manager's role. Had it come to light prior to the claimant's resignation I find that it is likely that the respondent would have initiated disciplinary proceedings against the claimant in relation to it. Such proceedings could have resulted in disciplinary sanctions, possibly even dismissal.

The Law

35. A constructive dismissal is defined by section 95(1)(c) of the Employment Rights Act 1996. In order to determine a claim for constructive dismissal it is necessary to determine whether there were acts or omissions by the respondent which were a cause of the claimant's resignation. If so, it is necessary to consider whether the acts or omissions amounted to a fundamental breach of contract. If so, it will be necessary to ask whether the claimant affirmed the contract following the breach. If these questions are all answered in the affirmative then there will have been a constructive dismissal within the meaning of section 95(1)(c). A constructive dismissal can occur whether the resignation is with or without notice.
36. In this case the claimant is relying on a breach of the so-called implied term of mutual trust and confidence. This is an implied term (as derived from the case of Malik v Bank of Credit and Commerce International SA [1997] IRLR 462.) that the respondent will 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.
37. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against a background of such incidents it may be considered sufficient by the tribunal to warrant it treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. Where the alleged breach of the implied term of trust and confidence is made up of a series of acts the essential ingredient of the final act is that it is an act in a series and the cumulative effect of the series of acts is to amount to the breach. Although the final act may not be blameworthy or unreasonable it has to contribute *something* to the breach even if relatively insignificant (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493). Although the final straw may be relatively insignificant, it must not be utterly trivial. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence.
38. If a constructive dismissal is found to have occurred a respondent can attempt to demonstrate that it was a fair dismissal. He must show the reason for the dismissal and that it was a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. If it was for a potentially fair reason the Tribunal must consider whether it was fair and reasonable within the meaning of section 98(4) of the Employment Rights Act 1996. The Tribunal must apply the band of reasonable responses test and must not substitute its own view for that of a reasonable employer.
39. If there is an unfair dismissal on procedural grounds it may be necessary to consider whether compensation should be reduced on the grounds that even following a fair procedure the claimant would have been fairly dismissed applying the principles in Polkey v AE Dayton Services Ltd [1987] IRLR 503. Likewise, the Tribunal can consider reducing the compensation payable on the grounds of contributory fault if it is found that the claimant's blameworthy or culpable conduct has in fact contributed to the decision to dismiss (s123(6) Employment Rights Act 1996). The Basic

Award can also be reduced to reflect justice and equity in light of the claimant's conduct (s122(2) Employment Rights Act 1996).

Conclusions

40. The claimant's case as put before me was that the fundamental breach of trust and confidence took place in the meetings between the claimant and Mr Prior on 26th January and on 7th February. In light of the findings of fact set out above I do not accept that there was any inappropriate or aggressive behavior by Mr Prior during his interactions with the claimant on 26th January. Mr Prior had legitimate, corroborated reasons for wishing to raise performance issues with the claimant. It is apparent that time was taken (several hours in fact) to assess the problem and coach the claimant and provide action points. Had the claimant been threatened with dismissal at that point it could have been done in fairly short order in a brief hearing. This is not what occurred. Indeed, there is no contemporaneous documentation to show that the claimant was unhappy at that point in time. Rather, he offered Mr Prior tea and a pie. Furthermore, his performance actually started to improve as a result of the coaching process. Consequently, there was no conduct calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the claimant and the respondent as at 26th January. Still less was the respondent acting without 'reasonable and proper cause'. It had very genuine and legitimate business and performance reasons for speaking to the claimant in the manner that it did.
41. Moving on to the interaction on 7th February I find that there was no breach of mutual trust and confidence in the behavior of Mr Prior on that day either. Once again, there was calm and professional interaction during which performance shortcomings were identified and solutions offered and explained.
42. So why did the claimant choose to resign? The claimant accepted in cross examination that he resigned because of events before the 11th February 2018. The matters that came after that led him to choose not to work his notice but did not contribute to the decision to resign. Having heard from both witnesses in this case and having considered the documentation at length it seems to me that although the claimant's performance had, to some extent, improved between 26th January and 7th February he was aware that there were legitimate performance concerns on the part of the respondent which remained and which he had struggled to rectify. In my view the claimant took the view that he was likely to be subject to performance management or dismissal because he was struggling to carry out the role even with only two stores under his supervision. On that basis it was arguably better to resign before performance management became formal or he was dismissed on grounds of capability.
43. There is a factual wrinkle in the case insofar as the claimant then decided not to work his notice after all but to resign with immediate effect. He says that this was because of the way that his grievance was handled

or, rather, not handled. He complains that there was a breach of the respondent's grievance procedure and that they did not act quickly enough. He relies on this as part of the breach of mutual trust and confidence leading to his resignation.

44. I note first of all that although matters occurring after 11th February may have led the claimant to bring forward the effective date of termination of his employment they did not, in themselves lead to the decision to resign itself. The claimant had already taken the decision to resign by that point and so if there was a constructive dismissal based on a breach of mutual trust and confidence this must have happened before the claimant communicated his resignation for the first time (with notice). To that extent anything occurring after 11th February is probably not material in determining whether there was a constructive dismissal. In any event, even if matters after 11th February did in fact contribute to the relevant resignation I do not take the view that they were in themselves a breach of contract for the purposes of the constructive dismissal claim. Nor could the events of this period be considered to be a last straw converting any previous conduct into a breach of mutual trust and confidence. The reality is that the respondent was not in breach of its own grievance procedure. The procedure did not require a grievance outcome within that 5 day period. Indeed, it is apparent that Fiona Dawson was fully intending to invite the claimant to a meeting to discuss his concerns. This is evidenced by the email that she sent to him. Whilst the claimant would have preferred a speedier response insufficient time had passed for the claimant to reasonably conclude that the respondent was either ignoring his grievance or had no intention of upholding it. He jumped to conclusions without legitimate reasons for doing so. I note that the respondent's grievance procedure makes provision for an anticipated hearing and conclusions within 14 days of receipt of the grievance. There was therefore no requirement for the respondent to deal with it within 5 working days. Even this 14 day expectation is not a strict requirement given that different grievances may require longer and more complex investigations. The procedure states that the 14 day outcome will be provided "where possible". Each case must be taken on its own merits and features. The claimant sought to suggest in evidence that he had been "brushed aside". I do not accept that this is the case. The grievance had been verbally acknowledged but was still waiting to be substantively dealt with. This is perfectly reasonable in the circumstances. Furthermore, the claimant's characterization of Fiona Dawson's attitude towards his grievance is undermined by the tone of the email at page 281 where she expresses shock and says that she is "sorry that this has happened" Even when the claimant resigns with immediate effect Fiona Dawson persists in offering a modified grievance procedure and does subsequently provide a grievance outcome. This shows that she legitimately and genuinely intended to respond substantively to the grievance. It is apparent from the contents of the claimant's solicitors letter that he was reluctant to spend time engaging in the grievance procedure given that "no obvious resolution can be reached as a result" (page 297).

45. The claimant also referred in oral evidence to an alleged phone call between himself and Fiona Dawson between the 11th and 16 February. He asserted that he was informed that the Managing Director did not want him to continue during his notice and that he should in effect "leave now". This

was not referred to in the claimant's witness statement to the tribunal and did not form part of his pleaded case. To that extent it was a new allegation and Fiona Dawson was not present to refute it. However, the impression gained from the claimant is that he was told he need not work his notice not that he was told that the respondent actively wanted him out of the business as soon as possible. I note that in the claimant's contract of employment there is provision for employees to be paid in lieu of working their notice and therefore such a conversation would be entirely consistent with that provision (paragraph 16.3 page 31). Not requiring someone to work their notice was not a breach of contract or a last straw in such circumstances.

46. In addition, the claimant has complained about being frozen out of his mobile and email accounts. Again, the respondent had a legitimate reason for doing this given that the claimant had contacted colleagues at a different store and created potential problems regarding a stock-take. At that point in time he was signed off sick from his notice period. He had no legitimate reason for making that contact and no legitimate reason to access his work phone and email. The respondent was entitled to take the view that such communication should be prevented whilst the claimant was not in work given his stated intention of resigning. Consequently, it cannot be said that the respondent acted without reasonable and proper cause. This shutting off of the claimant's email and phone facilities did not constitute a breach of mutual trust and confidence between the parties. Furthermore, it did not constitute a last straw. Knowing the circumstances as he did, the claimant cannot genuinely and legitimately have been upset by this conduct.
47. Taking all the events in the round I therefore conclude that there was no fundamental breach of contract entitling the claimant to resign taking events either separately or cumulatively. There was therefore no constructive dismissal, rather it was a resignation in the true sense. On that basis alone, the claimant's claim must fail. In any event the real reason for the claimant's resignation was not any abusive behaviour by Mr Prior but rather his own concern that he was struggling in his role and that he would ultimately be subject to legitimate performance management measures. Thus, the claimant did not resign in response to any breach of contract by the respondent. In those circumstances any question of affirmation of the contract does not arise for determination and there is no need to consider the potential fairness of any dismissal.

Employment Judge Eeley

Date: 22nd October 2018