



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: S/4103817/18 Held at Aberdeen on 15 October 2018**

10

**Employment Judge: Mr N M Hosie  
Members: Mr K Pirie  
Mr R Walker**

15

Mr Garry Saunders

Claimant  
Represented by:  
Mr F H Lefevre –  
Solicitor

20

Royal Mail Group Ltd

Respondent  
Represented by:  
Mr A Gibson –  
Solicitor

25

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is that the claim is dismissed.

30

### **REASONS**

35

1. The claimant, Garry Saunders, claimed that he was constructively and unfairly dismissed by the respondent ("the Royal Mail"). His claim was denied by the respondent.

### **The Evidence**

2. By agreement we heard evidence first on behalf of the respondent from:
  - Eric Davidson, Operations Manager and the claimant's Line Manager

**E.T. Z4 (WR)**

We then heard evidence from the claimant.

3. A Joint Bundle of Documentary Productions was also lodged (“P.”).

5 **The Evidence**

4. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact.
- 10 5. The claimant commenced his employment with the Royal Mail on 17 June. When he resigned, with notice, on 25 March 2018 (P.80) he was the Delivery Office Manager at Peterhead.

**Sickness Absence**

- 15 6. The claimant went off sick with work related stress on 12 September 2017. He remained off sick until his resignation (P.38). He had previously had a period of sickness absence from stress from 7 January 2015 to 26 June 2015. He returned to work on 27 June 2015 and apart from an occasional day off,  
20 he remained fit for his roll until 12 September 2017.
7. On 15 September 2017 Eric Davidson sent the claimant a “Standard Letter” concerning his absence from work (P.76/77). In that letter Mr Davidson advised the claimant that he was required to maintain contact and set out  
25 some actions that the claimant was required to do while he was absent.
8. The respondent’s “Absence Notification and Maintaining Contact Guide for Employees” was included with the documentary productions (P.114-118). As a long-serving employee and having been signed off previously due to ill-  
30 health, the claimant was aware of this guide. It contains the following provision (P.115):-

*“Employees must follow the appropriate absence notification process when they are absent due to illness, provide appropriate medical certificates in a timely manner and maintain contact with their manager throughout their absence.”*

5

9. The claimant was also familiar with the respondent’s “Managing Term Absence Guide for Employees” (P.119-124) which contains the following provision (P.121):-

10 *“It is important that both the manager and employee are proactive in maintaining contact during periods of long-term sickness absence. A weekly phone call can help to maintain the link with the workplace and reassure the employee that they are not forgotten.”*

- 15 10. The respondent’s witness, Eric Davidson, gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable.

- 20 11. The claimant maintained that when he was signed off, his Line Manger, Eric Davidson, only contacted him on two occasions in October 2017 concerning ill-health retirement and in December 2017 concerning an Occupational Health Report.

- 25 12. However, Eric Davidson gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. We accepted his evidence that after he had sent out the “Standard Letter” on 15 September (P.76) he telephoned the claimant to enquire as to his health. The claimant informed him that as his stress was work-related he would help him through his illness if he didn’t have contact with his work.

- 30 13. Mr Davidson called the claimant on “4 or 5” occasions and, as he put it: *“The message I was getting was that he was ill, had trouble sleeping. It seemed to be work-related. There was no specific reason as to what had caused it”.*

**The Claimant’s E-mail of 26 October 2017**

14. On 26 October 2017 the claimant sent an e-mail to Mr Davidson (P.77A). He advised him that he had been signed off for another month and attached his "sick line". He then went on in his e-mail to say this:-

5           *"Things have not been going well over the last couple of weeks. The medication I was on was knocking me out during the day and I was awake for most of the night. In addition my anxiety levels have increased and I have had a number of panic attacks at night. The G.P. has changed my medication. I'm now on .....for depression.....for anxiety/panic attacks. I would have phoned but am currently finding it very difficult due to the anxiety.*

10

*I have had two sessions with the Counsellor. **She wants me to minimise my contact with work whilst counselling is proceeding** (the Tribunal's emphasis) and to remain off work until the remaining four sessions have been completed (currently fortnightly). At the end of her sessions she said she will assess me again and decide on what further help is needed. Both her and the G.P. believe I returned to work too early last time and this has partly contributed to my current state of mind.*

15

20           *My next counselling session is 8 November and G.P. appointment 15 November.*

*I'm very sorry for the problems that my ongoing absence must be causing both you and Karen."*

25

### **Occupational Health Report**

15. On 27 December 2017, the respondent received an Occupational Health Report on the claimant (P.78/79). The following are excerpts:-

30           **"Current Health Issues**

Thank you for referring Mr Saunders for Occupational Health advice, regarding his current sickness absence since September 2017 with anxiety and depression. I understand that he has had symptoms for over two years which he perceives to be triggered by work. His symptoms have gradually been getting worse until he was unable to attend work. He has been under the care of his G.P. He is currently taking medication for anxiety. He has tried three different types of anti-depressant medication however he was side effects. His G.P. is going to review this at the end of January. He is attending counselling through the Feeling First Class Support Service and has had five out of six sessions, with no further plan.....

### **Current Capacity for Work**

In my opinion Mr Saunders is unfit for work in any capacity due to the severity of his symptoms. I am unable to indicate a return to work date at present. This will depend on any further treatment planned and his response to this.

You may wish to re-refer in six weeks.

### **Current Outlook**

Mr Saunders' outlook is unclear. He has tried various medications but unfortunately he had side effects. With a combination of appropriate medication and counselling it is likely his symptoms will improve, but time frames are unclear and you may wish to re-refer in six weeks' time.....

### **Disability Advice**

In my opinion Mr Saunders is not covered by the Equality Act.

### **Manager Question(s)**

*If Garry cannot return to work is it appropriate to consider ill-health retirement? – in my opinion this is not appropriate. I have advised him to discuss further treatment options with his G.P. which may help improve his symptoms enough to return to work. You may wish to re-refer him in six weeks' time.*

*Can we do anything further to support and enable Garry's return to work?: He has perceived work stress and before a return to work, I recommend that you carry out a perceived stress risk assessment and look at solutions that meet the expectations of Mr Saunders and management.”*

16. Despite the suggestion of a re-referral by the respondent in six weeks' time this was not done.

#### **Complaint to the Chief Executive**

17. On 9 March the claimant sent an e-mail to Moya Greene, the respondent's Chief Executive in London to complaint primarily about the lack of report and lack of contact from the respondent (P.81). The following is an excerpt:-

*“I have now been off work for nearly 6 months. During that time I have only been contacted by my Line Manager on approximately 3 occasions and one of his calls was to discuss the change in annual leave arrangements for Managers. I was contacted in October and asked for permission for a referral to the Employee Health Service. I agreed but the referral never took place. The last contact I had from my Line Manager took place in December when he discussed again referring me to EHS. I agreed and this referral took place on 27 December. The Occupational Health person recommended a further referral after 6 weeks. This has not happened and no one has discussed the report with me let alone contacted me for nearly two and one half months.*

*My G.P. has been very supportive but despite the medication and advice given we both feel that my recovery is being severely impaired by the lack of care from the business. I have tried to help myself by seeking a course of*

*counselling and the G.P. has referred me for further counselling through the NHS.*

5 *My recent struggle with mental health issues has been made so much more difficult due to the lack of contact and support from the business. I now feel totally worthless and neglected due to this. I have lost all my confidence and I feel totally isolated. This has had a devastating effect on myself and my family and my ability to cope and function on a daily basis.”*

- 10 18. The respondent sought clarification from Gerry McAuley, Delivery Director. His response was recorded in an internal e-mail from Bev Stevenson, Customer Service Advisor on 22 March:-

*“Gerry McAuley – Delivery Director has sent the following response:*

15 *Sorry for the response time but the OPS Manager for Aberdeen and Shetland will be leaving the business on 23 March and getting the full background that Mr Saunders has been problematic.*

20 *I have a report from OH Assist that was on the back of a review on 27 December. The report confirms that Mr Saunders is unfit for work in any capacity due to the severity of his symptoms. OH were unable to predict a return to work date at that time and that any future return to work would depend on any further treatment planned and his response. The report also confirmed that IHR would not be appropriate at that time.*

25

*My understanding is that Mr Saunders stated that he did not want any contact from his OPM Manager due to his health issues and that he had also told his team that he wouldn't be returning to his role in Royal Mail due to his illness.*

30

*I have appointed David Donaldson to the position as OPS Manager for AB/ZE on a temporary basis and he will make contact with Mr Saunders to discuss his current absence and we will explore a return to work taking into account any advice from OH Assist.”*

19. On 22 March the respondent sent a response by e-mail to the claimant's complaint (P.81). It was in the following terms:-

5 *"I'm sorry to hear that you feel that your recent experience has not represented the business message in terms of mental wellbeing. I do assure you that it is important to ask that colleagues feel supported when they are going through a difficult time.*

10 *We have been in touch with the Senior Operational team for the area and understand that David Donaldson has been asked to make contact with you to discuss your current absence and to see what can be done to support your return to work taking into account any advice from OH Assist.*

15 *Finally I have attached a link about the support we have made available to colleagues – I would encourage you to visit the site and in particular the link to Mental Wellbeing."*

20. The claimant was unhappy with this response. On 22 March he sent an e-mail to the respondent, copied to the Chief Executive (P.82/83). It was in the following terms:-

20 *"I have read the reply to my e-mail that was sent to Moya Greene nearly 2 weeks ago and I am totally shocked at the briefness and lack of addressing the issues that I have raised.*

25 *Why has the normal contact process not been followed?*

*Why have I not been contacted as a matter of urgency either by Mr Donaldson or OH Assist following receipt of my previous e-mail?*

30 *Why has your duty of care been neglected?*

*Why has the OH Assist advice from December not been followed?*



*Why have I been totally forgotten about?*

5 *The approach from the business to my absence has been atrocious and has been extremely detrimental to my health and wellbeing! It has shown that there is no substance to the mental health campaign or support for it by Senior Management. My experience clearly demonstrates that it is just a PR exercise to raise the business profile by attaching itself to its serious high profile topic.*

10 *I expect a reply by return which this time, fully answers the above concerns. In the meantime you have left me with no choice but to contact my local MP and also to seek professional advice from constructive dismissal.”*

15 21. On 23 March “Just Say It” forwarded the claimant’s e-mail to Gerry McAuley who was Eric Davidson’s Line Manager to express his concern (P.83). The following is an excerpt:-

20 *“I am also concerned about his final comments re: constructive dismissal/contacting MP which seems disproportionate with the “complaint” which appears to be about lack of contact whilst absent. As far as I am aware Mr Saunders as a Manager would/should know that he also has a responsibility to keep in touch and update his manager while absent and that there are complaint procedures. As such I feel that we (CEO team) may not be aware of the full facts....”*

25 22. Mr McAuley replied on 23 March (P.83/84) and Mr Northwich replied on 26 March with the draft of a proposed e-mail for the claimant (P.84/85). However, prior to that the claimant had tendered his resignation.

30 **Resignation**

23. On 25 March the claimant wrote to Mr Davidson to tender his resignation (P.80). His letter was in the following terms:-

*"It is with regret that I feel that I have been left with no choice but to tender my resignation from Royal Mail.*

5

*As you are fully aware I have been off work on long-term sick with work-related stress and depression since September 2017. During that time I have had virtually no contact from Royal Mail or my Line Manager. The approach of the business to my mental health issues has been atrocious! It has been*

10 *unsupportive, failed its (sic) duty of care and been extremely detrimental to my health and wellbeing and even the Employee Health Service advice to the business has been totally ignored.*

15

*Despite arranging my own counselling, the excellent support of my GP and my own efforts to strive to return to work in a shorter time as possible, the total lack of benevolence and interest in my health has left me feeling abandoned and effectively 'hung out to dry'. I am having to leave the business with a serious ongoing medical condition and the future feels very uncertain.*

20

*I understand that I have to give one month's notice. During that period I will continue to be signed off work by my GP so will be unable to take any outstanding annual leave. I would like to receive payment in lieu for this on completion of my notice. I understand that my potential bonus payment for*

25 *the financial year 2017 – 18 will still be due to me later in the year. I believe my last date of employment will be Saturday 21 April 2018. Can you confirm the above and let me know how much annual leave is outstanding as soon as possible."*

30

**Respondent's Submissions**

24. The respondent's solicitor submitted that the claim "fell way short of a constructive dismissal" and a breach of the implied term of "trust and confidence".
- 5 25. The respondent's "conduct" relied upon was a failure to contact the claimant during a period of sick absence but that had to be ? in the context of the claimant writing to the respondent and his Line Manager, Eric Davidson, on 26 October to advise that he wished contact to be "minimised" and Mr Davidson took that to mean that the claimant wanted to be given "space" to get better which was an entirely reasonable position to take and "at the end of the day Mr Davidson acted as the claimant had requested."
- 10
26. It was further submitted that the level of contact had to be considered in the context that the respondent had been given no indication of when the claimant was likely to be able to return to work. There was no indication in the fit notes which he was submitting nor in the Occupational Health Report which the respondent obtained.
- 15
- 20 27. Further, it was submitted that there was "*not at all to discuss anyway*" and that even if Mr Davidson had phoned more often there was little to discuss and there was a risk that he would be accused of "pestering" the claimant.
28. While it was accepted that someone should have followed up on the suggestion of the Occupational Health Report that there be a re-referral within six weeks that was "way short of breaching the implied term". In any event Occupational Health Advice is advisory only, not obligatory. It has to be considered in the context of the claimant's own failure to contact the respondent.
- 25
- 30 29. It was submitted that it was "a two-way street" and that there was a responsibility on the claimant as well to maintain contact which was made clear in the respondent's Guide (P.115).

30. Although the claimant maintained that he was unable to contact either Mr Davidson or Mr McAuley he was able to send an e-mail to the respondent's CEO. The claimant maintained that he did not have faith in either of them yet he still wanted them to contact him.

31. Further, after his resignation he had a further month to reconsider by then he was retraining for another job. He submitted that was the real reason for his resignation: he had another job to go to and by then he had gone on to half pay. The timing, it was submitted, was "clear". There were financial considerations governing his resignation. This was not about the conduct of the respondent, it was the claimant deciding that because of his ill-health he didn't want to consider working in the "high pressure job of Depot Manager in Peterhead".

32. The respondent was perplexed as to how his resignation came about particularly as they could still have looked into ill-health retirement and alternatively sought an alternative job with less responsibility.

33. The claimant had decided on a certain course of action, resigned, trained for a new role and he wasn't prepared, therefore, to reconsider or even discuss a future with the Royal Mail. He advised there was no point in Mr Donaldson contacting him.

34. The claimant complained about the lack of contact then when he was offered it he refused.

35. It was submitted that the lack of contact did not amount to a breach of the implied term of trust and confidence and that the claim should be dismissed.

30

### **Claimant's Submissions**

36. It was submitted by the claimant's solicitor that Royal Mail have clear policies as to how an employee who was signed off work due to ill-health should be

managed. The claimant was in poor health. That had to be taken account of when comparing the relative behaviours of him and Eric Davidson.

5 37. There were clear findings in the Occupational Health Report one of which was that there should be a re-referral within six weeks (P.79), but that was not done.

10 38. Although the claimant had advised Mr Davidson on 26 October that he wanted contacted to be kept to a minimum (P.77A), Mr Davidson should still have kept in touch and not ignored him completely around early December.

39. While the claimant's solicitor accepted that both parties have a clear duty to make contact with each other there were no definite rules about timescales.

15 40. He also submitted that there was a "further problem" for the respondent in that Mr Davidson "disappeared". He was the claimant's Line Manager and yet he made no arrangement for someone to contact with the claimant to find out what was happening and to get an update from him.

20 41. As a consequence, the claimant became more and more concerned about the lack of contact. He continued to submit sick notes but he was "*totally ignored*".

25 42. As a consequence on 9 March he decided to "do something about it and he sent an e-mail to the respondent's CEO". While this was perhaps not a "good idea" it was a form of complaint and the CEO had a duty to pass it down the line especially when dealing with an employee who was unwell and suffering mental health issues especially with a company with professes to deal properly with such matters.

30 43. Instead, it was left for a fortnight and by then the claimant had come to the view that he had lost faith in ever hearing from the respondent again.

44. This “combined failure” on the part of the respondent constituted a breach of the implied term of trust and confidence.

### **The Issues & The Tribunal’s Decision**

5

45. Having resigned, it was for Mr Saunders to establish that he had been constructively dismissed. That meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 (“the 1996 Act”) he had to show that he terminated his contract of employment (with or without notice) in circumstances such that he was entitled to do so without notice by reason of his employer’s conduct. It is well established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental 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. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

10

15

20

46. The correct approach to determining whether or not there has been a constructive dismissal discussed in **Western Excavating (ECC) Ltd v. Sharp [1978] ICR 221**, the well-known Court of Appeal case. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met:-

25

*“(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;*

30

*(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;*

*(3) He must leave in response to the breach and not for some other unconnected reason; and*

*(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agree to vary the contract."*

5 47. Accordingly, whether an employee is "entitled" to terminate his contract of  
employment, "without notice by reason of the employer's conduct" and claim  
constructive dismissal, must be determined in accordance with the law of  
contract. Accordingly, it is not enough to establish that an employer acted  
unreasonably. The reasonableness, or otherwise of the employer's conduct  
10 is relevant but the extent of any unreasonableness has to be weighed and  
assessed and a Tribunal must bear in mind that the test is whether the  
employer is guilty of a breach which goes to the root of the contract or shows  
that the employer no longer intends to be bound by one or more of its  
essential terms.

15

#### **Implied Duty of Trust and Confidence**

48. As far as the present case was concerned, I was mindful that there is implied  
into all contracts of employment a term that employers will not, without  
20 reasonable and proper cause, conduct themselves in a manner calculated or  
likely to destroy or seriously damage the relationship of trust and confidence  
between the employer and employee. Browne-Wilkinson J in **Woods v. WM  
Car Services Ltd [1981] ICR 666** described how a breach of this implied  
term might arise:

25 *"To constitute a breach of this implied term it is not necessary to show that  
the employer intended any repudiation of the contract: the Tribunal's function  
is to look at the employer's conduct as a whole and determine whether it is  
such that its effect, judged reasonably and sensibly, is such that the employee  
cannot be expected to put up with it."*

30

49. Further, in **Malik v. Bank of Credit & Commerce International [1997] IRLR  
462** Lord Steyn stated that, in assessing whether or not there has been a

breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover the impact on the employee must be assessed objectively.

5

50. When I considered the authorities, I recognise that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence.

10

51. What then of the present case? In the relevant documentation the respondent assesses the importance of communication when an employee is signed off work due to ill-health for a prolonged period. However, as the respondent's solicitor submitted "*that is a two-way thing*" and the claimant is also required to communicate with his employer and keep him advised of any progress.

15

52. When it came to communication, which was the pivotal aspect of this case, it was significant, that on 26 October the claimant advised the respondent that they should "*minimise contact*" with him (P.77A), in a sense, placed the respondent in "no win" situation as they had been advised by him not to make contact and yet their rules and procedure made it clear that such contact should be maintained.

20

53. As it transpired, the respondent subsequently obtained an Occupational Health Report which made it clear that the claimant was not fit for work either then or in the foreseeable future. However, that report recommended that there be a "re-referral in six week's time". That was not done by the claimant, but by the same token, the claimant made no effort to contact the respondent in the meantime to advise him of any progress and to remind them that they should be considering such a re-referral.

25

30

54. In such circumstances it was not unreasonable for the respondent to take the view that the claimant remained unfit for work and as the respondent's



solicitor suggested, there was little to discuss with him until such time as there was some indication as to when he might be able to return.

- 5 55. Matters were left therefore until 9 March when the claimant sent an e-mail to the respondent's CEO complaining about the manner in which he had treated.
56. The respondent did reply to the claimant on 22 March (P.82) but the claimant was not satisfied with that response and he resigned shortly thereafter.
- 10 57. I heard that the claimant's Line Manager had left the respondent's employment in **????** and I was surprised that no steps were taken to take over his responsibilities and explain the position which would have included the claimant. However, under the circumstances I was not persuaded that the claimant had established that the respondent was in breach of the implied  
15 term of trust and confidence having regard to his instructions to them to "*minimise contact*" and his failure to make any contact with them for a number of months prior to his resignation and then when he did complain and received the response he resigned shortly thereafter without affording the respondent any opportunity of discussing matters with him.
- 20 58. For all these reasons, therefore, I arrived at the view that the claimant had not been constructively and unfairly dismissed. Accordingly his claim is dismissed.
- 25 59. Finally, I should record for the avoidance of doubt, that the Tribunal was not persuaded that the claimant resigned because his sick pay was coming to an end. When he resigned he did not have another job to go to and that was not the reason.

30 **Note for NMH**

Remember there was a full Tribunal so use "we" instead of "I".

Also note that the claimant was apparently well enough to e-mail the CEO and yet he chose not to make contact with his immediate Line Manager or someone locally.

5 It would appear that the claimant's position was that he was too unwell to phone them but he wanted them to contact him.

10 So see from notes at page 43 that the Tribunal was of the view that Mr Davidson had not phoned the claimant on four or five occasions but only the three occasions according to the claimant.

Further, note that the claimant was given an opportunity to reconsider after he resigned but he decided not to do so.

15 It would appear that he resigned because of his mental health issues at the time but there was no breach of contract on the part of the respondent.

20

25 **Employment Judge: Nicol Hosie**  
**Date of Judgment: 23 November 2018**  
**Entered in Register: 26 November 2018**  
**And Copied to Parties**