



EMPLOYMENT TRIBUNALS

Claimant: Mr T Frith

Respondent: Royal Mail Group Ltd

Heard at: Southampton **On:** 5 and 23 November 2018

Before: Employment Judge Hargrove

Representation

Claimant: In Person

Respondent: Mr M Foster, Solicitor

JUDGMENT having been sent to the parties on 5 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant complains in an ET1 dated 24 January 2018 that he was unfairly constructively dismissed by the respondent and seeks re-instatement as a Postman. The facts of the case, which I will summarise, have some unusual aspects.
2. The claimant commenced employment with the respondent in December 2011 initially on a part-time and temporary contract but always working from Arundel. However, from 7 July 2014, he had been granted a full-time permanent contract on 39 hours per week. His Line Manager was Tony Cannon.
3. On 27 November 2014, the claimant had an altercation with a fellow employee and was placed on temporary suspension. There was some form of investigation but the claimant returned to work without disciplinary proceedings. He subsequently raised a grievance about his line manager in relation to that incident.

4. On 15 April 2015 he took an unpaid career break for one year from 11 April 2016, subsequently extended to April 2017. There is a career break policy at pages 144 – 146 which contains provisions with regard to a return to work but giving significant discretion to the respondent. The claimant claims, and I accept, that he did not see the policy until after his career break had started. The respondent claims via its only witness Mr Cannon that he had no authority to offer terms of a return to work and did not do so.
5. The claimant claims that Mr Cannon agreed to him returning to a full-time job at Arundel at a meeting in Mr Cannon's office in November 2016. I find on the balance of probabilities that he did give the claimant good cause to believe that he would be able to return to work at Arundel full-time. The claimant has been consistent from an early stage in correspondence to the effect that he was told that he could return.
6. In March 2017 the claimant was told that there were no full-time posts available at Arundel. At the time of or shortly before the return date, Mr Cannon offered the claimant alternative full-time work at Lancing, which was eleven miles away, and Worthing, which was ten miles away. According to the claimant Mr Cannon said to him "what do you expect when you have raised a grievance against me". I am not satisfied that Mr Cannon did make that remark. The claimant in any event refused and I accept that the reason for it was that it was extended travel for him and that it would significantly lengthen his working day and would be more expensive. The claimant had travelled a short distance by bicycle when he had previously worked at Arundel.
7. There was to be a further meeting with Mr Cannon later in April 2017 but Mr Cannon went off on sick from 21 April – 8 August 2017.
8. On 9 June, a grievance was lodged by the claimant against Mr Cannon in particular as of his failure to re-instate the claimant at Arundel (page 158). The claimant also asserted truthfully that he not received any back pay since April 2016 (see email of 12 June). The effect of that was that the claimant had had no income whatsoever coming into his family from April and was not in a position to claim benefits. In response to the grievance the claimant was told that he should take it up with his line manager who was, however, off at the time.
9. On 24 June 2017, the claimant was offered work at Arundel but only on 25 hours per week. Note the email of that date at page 163 which specified that the hours of work were to be 9.00am – 2.00pm on 5 days per week. It is also a fact that the claimant was again offered work at Worthing full-time but refused.
10. On 26 June, the claimant returned to work part-time on 25 hours a week and signed a contract to that effect on 4 July, (pages 156 – 158). It is common ground now that this was not signed under protest, I accept however, the claimant's statement that he was under considerable financial pressure with a mortgage and no income coming in.
11. On 24 July 2017, the claimant commenced a first set of proceedings in the Employment Tribunal claiming over £8,000 of unpaid full-time wages due

from 13 March 2017 until his return to work part-time on 26 June also, he claimed breach of contract. Unusually, the respondent conceded in its response that it owed him £6,387 as wages. The claimant agreed that sum and a Judgment was accordingly entered in that sum in his favour against the respondent on 12 October. That concession is entirely consistent with the claimant's claim that he had been promised a return to full time work at Arundel. On 27 October 2017, at a subsequent hearing the claimant's claim of breach of contract was dismissed. The reason why it was dismissed, I conclude, was that since the claimant was now working for the respondent, his employment had not terminated and the right to bring a claim of breach of contract against an employer does not arise until the employment comes to an end. Although I accept that is the basis on which the order was made, I have some doubts, in retrospect, as to the rightness of that decision but it has not been appealed.

12. On 17 October, the claimant resigned with effect from 30 October. His resignation letter is at page 166. It complains inter alia of a failure to offer him overtime opportunities over and above the 25 hour contract and of having been rostered regularly for five days per week particularly after Mr Cannon returned from sick leave in August 2017. The claimant claims that Mr Barker, who had been standing in for Mr Cannon, had rostered him regularly on three and four days per week averaging 25 hours per week which allowed the claimant the opportunity to work elsewhere to supplement his income over and above that received from the respondent.
13. The issues in this case are unusually complex. The tribunal identified them as follows:
 - (1) Did the respondent breach any express or implied term of the contract whereby the claimant should be allowed to return to work following a career break to a full-time (39 hours per week) job as a Postman at the Arundel depot on or about 1 April 2017?
 - (2) Did the respondent breach any express or implied term of the contract by failing to pay wages between 1 April and 26 June 2017?
 - (3) Did the claimant affirm any earlier breach of contract by accepting a new contract, or a variation of the original contract, upon his return to work on 26 June 2017 at Arundel on 25 hours per week, or did the claimant only accept under protest or under legal duress?
 - (4) Is the claimant estopped from claiming in respect of issues (1) and (2) above by reason of having failed to raise them in his first claim number 1801131(17), and having received a Judgment for unpaid wages?
 - (5) Was there a final straw or further examples of breach of the implied term of trust and confidence by Mr Cannon in failing to offer the claimant a reasonable opportunity of overtime or by altering the claimant's rostered work from three to four days out of six to five days out of six.
 - (6) If yes, did the claimant resign in response at least in part to the respondent's breach or breaches of contract?

14. If the answers to questions 1,2 and or 5, and 6 were yes, the claimant would be entitled to succeed. It is an implied term of all contracts of employment that neither party, in this case the respondent, will without reasonable and proper cause act in such a way as to be calculated - that means intended -, or likely, which does not require intention, to destroy trust and confidence by the employee in the employer. Any breach of that term is repudiatory: in other words it entitles the claimant employee to resign in response and claim that he has been constructively dismissed. The claimant need only show that the repudiatory conduct played a part in his decision to resign even if there are also other reasons. See **United First Partners Research v Carreras 2018** EWCA Civ 323, Court of Appeal. Constructive dismissal will also occur if there is a breach of an express term of the contract of a fundamental nature. Failure to pay wages on time is almost always such a breach. There may be circumstances in which there has been a repudiatory breach of contract but the employee does not resign in response, but elects to continue the contract, for example by continuing to work. If the claimant does not resign but remains in employment otherwise than under protest, he may lose the right to claim in respect of that breach. In other words, he affirms the contract and loses the right to subsequently claim unfair dismissal. If however, there are then further breaches, or further conduct amounting to a last straw contributing something to the earlier acts – see **London Borough of Waltham Forest v Omilaju 2005** ICR 481 – the claimant may be entitled to rely upon the totality of the evidence and resign and the earlier conduct of the employer may be relied upon. See **Kaur v Leeds Teaching Hospital NHS Trust 2018** IRLR 833.
15. With these considerations in mind I reach the following conclusions.
16. First, whether or not the claimant was contractually entitled under the career break policy to return to work full-time. I accept that Mr Cannon did agree that he could return to work full-time. It matters not that he may not have had actual authority to have agreed it. The fact of the matter is that the respondent in the first set of proceedings conceded that the claimant was contractually entitled to pay from the date of his initial return at the beginning of April 2017 until he did in fact return on 26 June 2017. This resulted in a Judgment being entered against the respondent. It is in fact the respondent who is estopped from denying the validity of that Judgment having conceded it. There was what could well have amounted to a fundamental breach of contract entitling the claimant to have resigned at that point. Unfortunately for him he did not do so. I have some sympathy for his position, but he did not at that stage take legal advice. Instead he elected under considerable financial pressure not imposed by the respondent directly or intentionally, to agree to return to work, albeit on a part-time contract. He accepts that he did not say that he was working under protest. This was not legal duress.
17. In my view the effect of that decision was that, having remained at work from 26 June until some four months until mid October without resignation or protest, he lost the right to complain of that repudiatory conduct by the respondent.
18. Effectively, the only issue which remains for me to consider is whether or not there was subsequent conduct by Mr Cannon following Mr Cannon's return from sickness in August, between that date and 17 October which revived the

earlier breach by the respondent, amounting to a further breach, or a final straw, and entitling him then to resign and claim constructive dismissal.

19. I have considered this matter carefully but I have accepted on the balance of probabilities in this case, the evidence of Mr Cannon that on his return he did not deliberately in order to punish the claimant for having raised a grievance against him deny him the opportunity to earn overtime. Nor do I accept that the claimant had a contractual right to be rostered on only 3 days per week or to overtime. The fact of the matter that, as the claimant agrees, he did not put in for overtime although he could have done so. If he had put in for overtime and it had been consistently refused without good reason, his position would have been much stronger. It is not entirely clear why he did not put in for overtime but that he did not is not in dispute. It is not in dispute also, that on a number of occasions, perhaps three or four, the claimant was offered the opportunity for overtime without having applied for it and did undertake overtime. That part of the claim by the claimant fails, as also does the other claim that there was a deliberate rostering of the claimant on five days a week instead of the three to four days by Mr Barber when Mr Cannon was absent up to August 2017. I do not accept that Mr Cannon did that deliberately either. It does not seem to be in dispute that Mr Cannon was unaware that the claimant was using the free time on one or two days per week which resulted from him only working three to four days to work elsewhere to supplement his income, which I accept he did. There is no evidence whatsoever that Mr Cannon was aware of that, although there is evidence that Mel, a Postwoman who did the rosters, was aware. There is no evidence of any instruction by Mr Cannon of Mel to ensure that the claimant worked a full five day week part-time in order to prevent the claimant from working else where.
20. In these circumstances, although in some respects I have some sympathy for the claimant, there having been earlier repudiatory breaches by the respondent, his claim of unfair constructive dismissal fails.

Employment Judge Hargrove

Date 20 December 2018.

REASONS SENT TO THE PARTIES ON

16 January 2019

FOR THE TRIBUNAL OFFICE