



EMPLOYMENT TRIBUNALS

Claimant: Mr A Thomas

Respondent: Britannia Superfine Ltd

Heard at: London South

On: Wednesday, 31 October & Thursday, 1 November 2018

Before: Regional Employment Judge Hildebrand (Sitting Alone)

Representation

Claimant: Mr M Foster, Solicitor

Respondent: Mr S Joshi, Solicitor

JUDGMENT having been sent to the parties on 17 November 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

The Issues

1. I deal first with the issues which I have to determine. The primary issue is whether the Claimant was entitled to resign as result of a breach by the Respondent of the implied duty of trust and confidence. No agreed list of issues was supplied. The claim form was drafted by the Claimant's solicitor. At paragraph 40 of the Particulars of Claim, headed Statement of Alun Thomas, it states:

“I realised at this point that this was the last straw. The way I had been treated in the weeks following up to that day was such that I have no trust and confidence that I could rely on my employers acting fairly towards me.

- a) Firstly, and without due cause they had removed my use of the company car which would dramatically increase my cost of getting to work.
- b) Despite my concerns about physical violence towards me as a manager nothing appeared to have happened to protect my position.
- c) I was now subject to discipline for the most serious of ‘racist’ behaviour on which no allegation had ever been made, or any comment made to me as to what it was about.
- d) The final straw was that it was clear that my job was now being advertised, even before any disciplinary action had been considered.”

This case is therefore a constructive unfair dismissal claim based on breach of the implied duty of trust and confidence relying on the allegations set out above.

2. An agreed list of issues was produced as follows: -

1. Did the Respondent breach a term or terms of the Claimant’s contract of employment?
2. Did the Respondent without cause remove the use of a vehicle issued by the Respondent to the Claimant?
3. Did the Claimant have a contractual entitlement to use the vehicle?
4. Did the Respondent take adequate action to protect the Claimant’s position?
5. Did the Respondent notify the Claimant of the racially abusive language he allegedly used against VO on 18 August 2017?
6. Did the Respondent advertise the Claimant’s position in order to replace him on 5 September 2018?
7. Do all or any of the allegations set forth above amount to a breach of the Claimant’s employment contract?
8. If so, do all or any of the breaches amount to a fundamental breach of the Claimant’s employment contract?
9. Did the Claimant resign in response to the fundamental breach?

10. If the Claimant was unfairly (constructively) dismissed, was he dismissed for a potentially fair reason?
11. Was the Claimant's dismissal for conduct a fair dismissal within the meaning of Section 98(4)?
12. If not, should the Tribunal reduce any award of compensation pursuant to Section 122(2) and Sections 123 (6)?
13. If a fair procedure had been followed could/would the Respondent have dismissed the Claimant for a potentially fair reason?
14. If so, for how long would the claimant's employment have lasted?

Counterclaim

15. Did the Claimant breach his contract of employment by tendering notice of his immediate resignation on 14 September 2017?

NB 1 Respondent says that the Claimant was dismissed for employing racially aggravated language on 18 August 2017 towards VO by calling him a dirty immigrant cunt and lazy wanker”?

NB 2 Claimant says that he did not use that language, and, in any event, a decision had been made that both parties would be given a final written warning and not dismissed.

The Evidence

3. In the course of the hearing I heard evidence from the Claimant and on the Respondent's side from Mrs Gillian Manser, Company Secretary, Mr Martin Manser, Transport Director and one of the drivers referred to as VO in this judgment.

The Findings of Fact

4. I made the following relevant findings of fact. The Respondent is a manufacturer of chocolate products and has a distribution section, which it uses for the distribution of its own products and it also undertakes outside contracting and delivery for other organisations. Approximately 70% of the haulage is inside UK and the balance is to the European continent.
5. The Claimant began work for the Respondent as a transport clerk on 10 May 2010 and progressed relatively quickly to the role of transport manager. A statement of terms is contained in the bundle together with the employee handbook. The Respondent assisted the Claimant in his development and the Claimant was keen to obtain a qualification. He

attained the CPC or Certificate of Professional Competence both for domestic and international haulage. He had achieved this by March 2011 and in a relatively short period of time thereafter became the only employee with the Respondent holding that essential qualification for a haulage operation.

6. The Respondent raised at evidence of concerns at various points regarding the Claimant's skill in dealing with conflict and management issues. The Claimant's employment gave rise to several contentious issues over the period of his engagement. These are not in the remote past but appear to be in the relatively recent past, prior to the events which led to termination of the Claimant's employment.
7. At a date which was not specified in early 2016 the Claimant walked off the site and was placed under threat of disciplinary action for going absent without leave. He was later called to a disciplinary hearing on 17 November 2016. There were also allegations at around this time about calling at one of the forklift truck drivers an obscene insult.
8. The Claimant responded to the disciplinary invitation by resigning on 18 November 2016. He was subsequently persuaded to return to work, and the disciplinary hearing took place on 21 November 2016. The Claimant was given an oral warning for his conduct. No action was taken in relation to his absence without leave and the withdrawal of his resignation was accepted by the Respondent.
9. By July 2017 the Claimant was seeking other employment. It is not clear when the Respondent first became aware of this although it is likely that they were aware at the time when the events that gave rise to termination of the Claimant's employment.
10. On 7 July 2017 the Claimant complained about the way in which another individual CM, a driver, spoke to him. Mr Martin Manser advised him to meet with the driver in private and to set up a disciplinary hearing. There is no record the Claimant did that.
11. There was an incident on 18 August 2017 where the Claimant remonstrated with VO, a driver of a vehicle, in relation to the state of cleanliness of his vehicle. During that confrontation, from the evidence of VO, the Claimant was extremely rude to him and made racist remarks. This was corroborated by another individual who was present. VO went to the office to complain and Mr Martin Manser took him to speak to the Claimant about it. He sought if possible to defuse the situation and dealt with the two individuals, in his words, as if they were children. Unfortunately, this tactic did not produce resolution. I accept the evidence

that VO put directly to the Claimant at that time when he was taken to meet the Claimant his full allegation. By that I mean not only the allegation that he was called lazy with an expletive but also that he was insulted in highly offensive and racist terms as an immigrant as appears below. The Claimant was thus aware of the complaint made by VO at that point. The Claimant said that he had been assaulted by VO. On his side he accepted that he had verbally assaulted VO. Mr Manser asked what the cause of the dispute was and was told it was the cleanliness of VO's truck. He said VO had waved his hand dismissively at him. He said he was going to call the Police. Mr Manser said that if the Claimant was going to be that vigilant with drivers and trucks he must be the same with all drivers not just VO. He told the Claimant that VO did a good job and the Claimant responded by agreeing, saying he did not break the rules.

12. Shortly thereafter the Claimant asked what action was being taken about this incident. His reason for the enquiry was that after the remarks made by the Claimant to VO, VO had approached the Claimant and either pushed or "dropped" him to the ground which the Claimant said this caused him injury. This was subsequently reported to the Police by the Claimant although it does not appear that any further action was taken by the Police by threat of prosecution against VO.
13. It is not clear whether that enquiry raised by the Claimant was intended to be a formal grievance. It was not treated as such by the Respondent and it does not state in his enquiry that it is to be so treated.
14. VO was interviewed by Mrs Manser on 21 August 2017 and she took a statement from him. He signed his statement on 25 August 2017. In it he said that the Claimant told him his truck was "fucking disgusting." He said the Claimant was like a mad man. As he walked to the office the Claimant said VO was "a dirty immigrant cunt" and "a lazy wanker." The Claimant when challenged repeated the statement that VO was "a wanker." VO said he lost his temper and grabbed the Claimant by the tea shirt. The Claimant then called him a "dirty immigrant wanker." VO said at this point he pushed the claimant to the ground. JJ and NM then split the two men up. JJ took VO to the office to speak to Mr Martin Manser as he was so upset.
15. Mrs G Manser also interviewed JJ. His signed statement states the Claimant called VO a "dirty immigrant wanker." When challenged he repeated the remark to VO. VO then grabbed his shirt and put the Claimant on his back. Then JJ and another driver pushed VO away from the Claimant went to the office and spoke to Mr Martin Manser but the Claimant did not. JJ then said the Claimant spoke to him a few hours later to say he would take the Respondent to a tribunal and win.

16. An individual called NM was apparently also present at the time but was not interviewed.
17. The Claimant has made in cross-examination reference to the fact that this other individual was not asked to produce a statement although there is nothing to suggest that he had any information to offer in relation to what took place if indeed he heard or saw the interaction. There is nothing to suggest the Claimant asked for him to be interviewed at the time. VO signed his statement on 25 August 2017. On 30 or 31 August the Claimant met with Mrs G Manser. He did not produce a statement at that point.
18. On 4 September 2017 Mrs G Manser wrote to ask the Claimant to produce a statement complaining that he had not provided one. She gave an indication that he and VO would be given a final written warning, the Claimant for his language and VO for physically assaulting the Claimant. Again, at this stage it does not appear that any formal grievance was raised by the Claimant.
19. It thus appears that the outcome of the disciplinary process had already been determined by Mrs Manser when she indicated that final written warnings would be issued to both employees. The statements she had taken were produced to the Claimant and there had been no hearing and no opportunity to consider what the Claimant had said at that point.
20. The Claimant produced his version of events on 5 September 2017. He appears to accept that he criticised the cleanliness of VO's vehicle and told him he would give him tips about cleaning it which may have appeared sarcastic. He disbelieved VO, when VO said when he had last cleaned the vehicle. The Claimant said VO waved him away saying "Bye Bye" insultingly. The Claimant accepted he said: "What you want to do V is learn to do your job, your lazy, you're a lazy wanker." He said VO then grabbed him by the throat and threw him to the ground and bent over him with a clenched fist. He was then pulled away by some members of staff. He said VO reported the incident in the office and if he had not done so the Claimant would have.
21. On the same day the Respondent placed an advertisement seeking an individual with similar qualifications to the Claimant in a role similar to the Claimant. The evidence of Mr Manser in this context was that the company was expanding and needed further support in the role of transport manager. The Claimant and Mr Manser were both overloaded with work. Long days worked by both men required cover and he had already discussed this with the Claimant on previous occasions. There is nothing in the documentation or the Respondent's response or the evidence of Mr Manser supplied in the witness statement to assert that Mr

Manser discussed the employment of another transport manager with the Claimant.

22. The Claimant went to a hospital appointment in early September in relation to an investigation of glaucoma, or raised intraocular pressure, which he was suffering. When he spoke to Mrs Manser about this she understood him to be informing her that his eyesight might be lost suddenly at any point.
23. The Claimant had on what appears to be a non-contractual basis had the loan since 2013 of a vehicle supplied by the Respondent with no charge with respect of his fuel. The Claimant returned the keys to this car on 8 September. There is a direct conflict in relation to the reason for the return. The Claimant says that he was told to return the keys. Mrs Manser says that he volunteered to return the keys after the discussion she had with him about his eyesight.
24. My finding is that whether he was ordered to return the keys or not it was made clear to the Claimant that he should not drive until the medical position and the consequences for the Respondent's vehicle insurance have been made clear it follows that the return the keys was the logical thing for the Claimant to do at that point.
25. On 13 September 2017 notwithstanding her earlier indication that the outcome of the Claimant's conduct would be a final written warning Mrs Manser wrote to the Claimant and to V to say that a disciplinary hearing would be listed on 19 September 2017. The Claimant's hearing would be in the morning and VO would be heard in the afternoon.
26. In a relatively unusual passage of evidence Mrs Manser said that this disciplinary hearing was not about the incident which took place on 18 August 2017 but related to other matters which to her great concern V had raised in her discussion with him.
27. It is difficult to accept that is the case simply because the letter to VO expressly states that it is about the incident of 18 August 2017, although the Claimant's letter is more general terms. It is difficult to see how the Respondent could at this stage be seeking to re-open a matter which had already been closed based on the indication given to the Claimant that he would receive a final written warning.
28. In response, as in the case of earlier disciplinary proceedings, the Claimant resigned. He cites inadequate action against VO, removal of the

company car and notification of the disciplinary hearing as the three grounds for his resignation.

29. In response to the resignation the Respondent asked the Claimant to return. There has been evidence about the importance to the Respondent of an individual holding the CPC International qualification, which the Claimant held, to their business. Reference to the allegation of racist language was repeated in the letter of 15 September 2017. The Claimant was informed that a grievance hearing would be arranged to hear his concerns on 19 September 2017. Formal disciplinary proceedings would continue after his return. On 21 September 2017 VO was given a final written warning by the Respondent. The Claimant challenges the validity of that document. It has to be said that in the course of this evidence today VO did not appear to have recollection of attending any disciplinary meeting or receiving that document.
30. The Claimant presented a claim to the Tribunal relying on 4 aspects together cumulatively indicating a breach of the implied duty of trust and confidence. These are the request to return the car without reason, that nothing had been done to protect his position at work from violence, the threat of discipline for racist behaviour and the fact that his post had been advertised.

Submissions of Claimant

31. The oral submissions sought to emphasise aspects of the evidence. No authorities or propositions of law were cited. The written submissions suggest that the Claimant was unaware of the seriousness of the allegation made by VO against him. It is clear the Claimant relies on the removal of the car, failure to protect the Claimant, bringing disciplinary proceedings against the Claimant without reference to VO and advertising his job as the final straw.

Submissions of Respondent

32. The Respondent referred to Western Excavating and Tullet. Reference was made of the need to show an intention, objectively judged, to abandon and altogether refuse to perform the contract.

The Law

33. Section 95 of the Employment Rights Act 1996 requires that before a claim of unfair dismissal can be presented there must either have been an

express dismissal or the employee must have been entitled to leave the employment on the grounds of the employer's conduct with or without notice.

34. The seminal case of *Western Excavating v Sharp* made clear that this is a contractual test and not one to which the concept of reasonableness is applicable. It is also clear that in considering a breach of implied duty of trust and confidence the cumulative conduct of the Respondent can be considered. Indeed, the last straw may not need itself to be a breach of contract, but it must add something to the previous conduct of the employer. The test as set out in *Malik* is that the Respondent must be demonstrated without reasonable and proper cause to have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence between the employer and the employee.

Conclusion

35. It has to be said in this case that the relationship of employer and employee was a relatively unusual one. The Claimant was actively applying for other positions, although that is not in itself inherently problematic, but the Claimant had demonstrated a propensity for threatening resignation and resigned on occasion. While there is no contractual obligation to prevent an employee from seeking other employment the fact that attempts to use contractual procedures have met with this response provides a context. Further, the Respondent was trying to recruit an employee with the qualification of the Claimant. The Respondent states there was enough work for two transport managers. The Claimant alleges this was a step to oust him. It would be difficult to construe a contractual obligation preventing an employer from reducing its reliance on an individual employee.
36. The Respondent appears in its dealings with not only the Claimant but also other employees to have indicated a desire to retain staff in employment rather than to jeopardise that possibility by engaging in formal disciplinary or other action. The Respondent was clearly aware of its vulnerability without a CPC holder. Although the Claimant has sought to demonstrate that the Respondent could have operated internationally without a CPC holder as transport manager, Mr Manser must be believed and credited when he emphasised his desire to work absolutely in accordance with the regulatory framework in this context. His desire, which apparently has not met with success, was to have a CPC holder in place at the earliest opportunity in the event that the Claimant left the Respondent.
37. In those circumstances I do not find it a fundamental breach of the Claimant's contract, or indeed a matter that can properly be relied on as

constituting with other facts such a breach, the placing of a job advertisement for an individual with similar qualifications to undertake a similar role to the Claimant. The Respondent was in a vulnerable position. It was aware of its position and it was not unreasonable in those circumstances for it to seek to obtain another employee who could assist it in the event of difficulty or indeed if there was a further increase in the volume of trucks it wished to run and the more intensive operations which expansion had allowed it to plan.

38. In relation to the company car I do not accept that the removal of the car from the Claimant can demonstrably be connected to the events which took place on 18 August 2017. The Claimant, having suffered from an eye condition for some time, had a consultant ophthalmologist appointment on 4 September and reported on that visit to Mrs Manser. She was understandably concerned to establish that she was legitimately in possession of insurance which entitled him to drive a company vehicle. I do not accept that in those circumstances her reluctance to allow him to continue driving without some assurance of the medical condition of the Claimant could amount to the breach of contract or could jointly with other aspects be said to be a breach of the implied duty of trust and confidence.
39. In relation to the behaviour of the Claimant it is clear, from the evidence that Mrs Manser gave, that the effect on VO of the Claimant's conduct, although I accept not tested in an independent hearing, was something that had not been clear at the outset on 18 August 2017 or until she had an opportunity to speak to VO at length. It was a matter of concern to her. I do not accept it could be a breach of the implied term for an employer to wish to consider what appropriate procedure should be taken in relation to what appears to have been a long period of racial harassment by the Claimant against VO. Had the Claimant not resigned a meeting could have taken place. The Claimant could have explored the depth and extent of the allegations against him. The Respondent could have made a decision which could have been challenged on appeal, if appropriate. The Claimant's grievance could have been considered. I do not consider that this aspect could alone, or with other matters, amount to a valid ground for the Claimant treating it as a breach of the implied duty of trust and confidence.
40. Finally, the Claimant says that nothing was done to protect him. Despite deficiencies in the procedure I accept that the Respondent gave a warning to VO in relation to his conduct and that he was aware that violence to other members of staff was not acceptable. It is by no means clear that the Respondent was under any obligation to inform the Claimant of the sanction imposed on another employee or that the Claimant took any steps to enquire in relation to the sanction imposed on VO. It is not clear that the Claimant said anything to the employer about what he required of them in this context. I assume that VO was given a final written warning

as the document records. The Claimant's position is that he would not return to work in those circumstances. He contends there was a breach of his contract because VO was not dismissed. I find that to be an unsustainable proposition for the Claimant to advance.

41. Therefore, taking all these matters together I do not find the basis for a finding a breach of implied term of trust and confidence on the part of the Respondent. Indeed, the Respondent appears to have done a great deal above and beyond what might otherwise be expected to keep the contract under which the Claimant worked alive at a time when the Claimant wished to resign for his own reasons.
42. I therefore find the Claimant was not entitled to resign his employment and was therefore in breach by his resignation. Indeed, in contrast to the Respondent it appears that the Claimant did not consider himself bound by the terms of the contract but on two occasions resigned in the face of disciplinary hearings rather than use the processes established under the contract. The Claimant's claim of unfair dismissal therefore fails as does his claim of breach of contract. The Respondent's counterclaim in respect of the Claimant's breach of contract for failure to work his 6 months' notice therefore succeeds.
43. After the judgment was given the Respondent indicated that the counterclaim was not pursued in relation to remedy.

Regional Employment Judge Hildebrand

Date 30 January 2019