



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr D Warburton

Neilcott Construction Limited

Held at London South

On 26 & 27 February 2019

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: Mr MacCabe, Counsel

For the Respondent: Mr R Bhatt, Counsel

JUDGMENT

The decision of the tribunal is:-

1. The claim for unfair dismissal is well founded and it succeeds.
2. The claim for age discrimination is dismissed upon withdrawal.
3. The Claimant is awarded a basic award of £8,802 and a compensatory award of £14,583.60.
4. The total award is £23,385.60.

REASONS

1. The Claimant claims constructive unfair dismissal following his resignation from his employment with the Respondent on 1 February 2018. I have heard evidence over the course of two days from the Claimant himself, from Mr Elster,

Managing Director of the Respondent, Mr Magnus who is a Project Manager and Mr White who is a Senior Contracts Manager. The facts that I have found and the conclusions I have drawn from them are as follows.

2. The Respondent is a construction company. The Claimant initially started work for the Respondent in 2000. He had a short break in employment around the year 2005 but recommenced his employment with the company on 22 May 2006. His job title was Project Manager. In April 2017, he advised Mr Elster of his intention to move house from Lingfield in Surrey to Bourne in Lincolnshire. There was a meeting between Mr Elster and the Claimant on 24 July 2017. I find that at this meeting the Claimant requested that the company gave consideration to his new place of residence when assigning him to projects, but he did not inform Mr Elster that he would no longer be able to work on any site in the Respondent's usual area of operation (mainly within the M25 area around London). Mr Elster proposed that the Claimant might like to work on a project by project basis for which he would be paid a daily rate, so that he could be more flexible about how much work he did. Mr Elster said to the Claimant that he would need to have a month off work and then his employment could continue on the new basis. I find that the Claimant was amenable to this proposal as he felt it would offer him flexibility in terms of his work for the company following his change of location. The conversation that took place is referred to in an email from Mr Elster to other senior managers of the company on 24 July 2017 at page 51 of the Bundle.
3. The first point at which we see a written proposal from the company to the Claimant as to what the new arrangement would look like is contained in a letter dated 16 August (page 53). Mr Elster proposes that the Claimant could be paid on two possible bases, the first a daily rate of £350 or in the alternative a rate of £310 per day with contribution to travel costs up to £50. The letter states: 'we would anticipate your engagement being on the basis of short term contracts for defined periods on a project by project basis as and when the needs arises'. There is no reference to the need for a break in employment.

4. At page 55 we see a note that the Claimant prepared for himself in which he raises some queries about the proposal. It is not clear if this email was forwarded onto the Respondent, but Mr Elster accepts that the points set out in that email were discussed between himself and the Claimant, and that led to a revised offer being made to the Claimant on 29 August 2017. In this letter the proposed daily rate is £285 per day. The rate had changed because Mr Elster had recognised that the Claimant would be entitled to paid holiday in any event and this could not be included in the daily rate. The letter stated that the Claimant would be entitled to reimbursement of his travel costs through the normal expenses system. Again, there is no mention in that letter of the need for a break in employment.
5. On 1 September, the Claimant sent an email to Mr Elster in which he said, “thank you for your revised contract proposal which I would like to accept” and noted that he would await receipt of the full contract documents in due course.
6. On 2 September 2017, the Claimant commenced his one-month break. At page 60 of the Bundle there is a letter from the Respondent to the Claimant which purports to acknowledge receipt of his ‘resignation’ and confirms his last day of employment as Friday 1 September 2017. There is no evidence to suggest that at any point the Claimant had agreed to resign from his employment.
7. On 2 October 2017, the Claimant returned to work, working at the Westminster School site that was then in progress. Contractual documentation was not sent out until 19 October 2017 and that is the document in the Bundle at page 63. This referred to the daily rate of £285 per month. It stated that the Claimant would be employed as Site Manager, although his previous title had been Project Manager. It stated that his continuous employment started on 2 October 2017, provided for one week’s notice and for statutory sick pay as opposed to the generous company sick pay scheme that had operated under the Claimant’s previous contract of employment.
8. On 31 October 2017, the Claimant wrote a detailed letter to Mr Elster setting out his concerns about the contract that had been sent to him. He stated that in

previous discussions there had been no mention of any demotion or change to his role, and he wrote: "It states that the present employment within this contract is not continuous with the previous period of employment and as such I will be forfeiting any redundancy rights which I am definitely not willing to accept, our discussions have been about my changing to a daily rate contract but at no point had there been any indications that this would affect my long service." The Claimant also raised queries about his working hours, whether he would be paid for Saturdays and about his notice period. Mr Elster invited him to a meeting to discuss his concerns on 6 November and I have seen a note at page 66 which records the matters discussed. In relation to the question of continuous employment, Mr Elster notes "impossible to have this any other way without Ross being available for all NCL Projects irrespective of location."

9. On 8 November 2017, Mr Elster wrote to the Claimant again setting out his response to the concerns. Mr Elster noted that the new contract of employment did not provide for continuity of employment and he states there that 'this is necessary given that your new location which you advised will preclude you from being able to work within the company's full geographical area of operations is more likely to create situations whereby from time to time there is no suitable work available for you'. On the question of his title and on who his line manager would be, Mr Elster stated 'the company would dictate who your line manager is. If the Claimant was the lead on site this would be the contracts manager, on a project where he was not the lead, the line manager would be the lead site based manager whoever that may be' and he confirmed that on the Westminster School project, the Claimant's line manager would be Danny Magnus, a person whom the Claimant says he was previously of equal rank with.
10. The letter goes on to say that in the event that the Claimant did not want to accept the new arrangement, he could revert to his previous contract of employment but in that case the company would only contribute his travel expenses up to £200 a month. In fact the Claimant's commuting costs from Lincolnshire would be considerably more than that. In the past, the Claimant's

cost of travel from his home to whichever site he had been working on had always been reimbursed.

11. On 11 November 2017, the Claimant wrote back to Mr Elster and said “further to our meeting and the letter clarifying the points which I was unsure of, please take this email as confirmation that I accept the original proposal of employment’ as amended by that letter.
12. The Respondent then sent out a further copy of the contract, this had been amended to record a new daily rate of £260, which had been adjusted to allow for the fact that if the Claimant worked on Saturdays he would expect to be paid (which seems reasonable given that he was to be paid a daily rate). Continuous employment is still stated as commencing on 2 October 2017. The Claimant is described as a Site Manager and the notice period remained unchanged.
13. The evidence of the Claimant is that he felt under duress to accept that contract. I accept that he was unhappy with the company’s proposals. He says at the time that he felt he had no option, he was paying two mortgages and he needed to stay in employment, so he indicated that he would accept the basis of working set out in the contract issued by the Respondent.
14. Mr Warburton continued working through November and December 2017. On 3 January 2018 he received an email from the HR Administrator of the Respondent stating that his fuel card would be cancelled but he would be paid a fixed rate of £6.50 per day based on a round trip from his home to Peterborough Station. The email added ‘whilst writing could you please complete a timesheet each week which needs to be authorised by Danny Magnus and forwarded to Robert Cox’.
15. The Claimant was off sick between 15 and 19 January 2018, and when he returned he realised that he had been paid statutory sick pay for those days. On 30 January 2018, he resigned giving the Respondent one week’s notice. He stated in that letter “I do hope the management and my colleagues will

understand my reason for resigning and I wish Neilcott the very best of success in the future’.

16. The evidence of Mr Magnus was that prior to resigning the Claimant had indicated that he had the possibility of work close to his home in Lincolnshire and he was considering taking that. The other document I have been referred to in the Bundle is a text exchange between Mr Magnus and the Claimant which took place after he had resigned where the Claimant says that he had started the new job but on 15 March but that he decided ‘it was not for me just managing teams of brickies’. The Claimant says that this was in fact not true, and that he sent that text to Mr Magnus as a text because he was wondering how much information was being passed through to Mr Elster.

Decision

17. I go on to consider those facts in the context of the claim. Mr Warburton asserts that he was constructively dismissed by the Respondent with effect from 1 February 2018. He relies upon an alleged breach of the duty of trust and confidence. The test is: did the Respondent act in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the employee? (That is the test set out in the *Malik* case).
18. I have significant concerns about the actions of the Respondent around the proposed one month break. I find that Mr Elster said to the Claimant during the course of their discussions that he could have a month off and that this was necessary because the contract was being changed. The Claimant agreed to this. Mr Elster did not make it clear at any point during these discussions that the ‘month off’ could result in the loss of his statutory rights, I find it significant that the proposed break was not mentioned in either the letter of 16 August or the 29th August 2017.
19. I accept that the Claimant was surprised to receive the letter of 21 September 2017 referring to a resignation. It is arguable that the letter in itself could amount to a dismissal and could have given rise to a right for the Claimant to

claim for unfair dismissal at the time, but that is not the claim in front of me today. Nor is it argued that the letter amounts to a repudiatory breach of the duty of trust and confidence (which is a claim that is probably excluded by the *Johnson v Unisys* litigation).

20. The Claimant did not challenge the letter at the time, he took his one month break and he returned to work for the Respondent on 2 October. Mr Elster's case has been, in effect, that he did not understand anything about the effect of the one month break on the Claimant's entitlement to redundancy pay, notice rights or his right to claim unfair dismissal. He says it was not his intention to deprive the Claimant of those rights. He simply believed (incorrectly he now accepts) that a break was necessary if the terms of the contract were to change.
21. I have to say I find that contention very difficult to accept. Mr Elster is the long standing managing director of a company that employs 150 staff. The company has an HR Administrator and it seems extremely surprising to me that Mr Elster would have no understanding at all of how statutory rights operate and the significance of any break in employment. In any event, if Mr Elster genuinely did not understand the effect of the one month's break on the Claimant's statutory entitlements, the point was made very clear to him when the Claimant sent his letter of objection on 31 October 2017 and complained about his loss of redundancy rights.
22. Mr Elster said that in the meantime he had taken advice and understood that in fact a one month break was not necessary upon a change in contract, but nevertheless he was content to proceed on the basis that continuity of employment would be lost.
23. In fact, under cross-examination Mr Elster made it clear that he understood exactly the implications of what was happening. He said that the new arrangement would amount to a fixed term contract where by the parties would be able to decide at the end of each project whether other work would be offered and that therefore 'redundancy did not come into it'. I infer from this

that Mr Elster wanted to enter into a future arrangement with the Claimant where he would not have statutory protection and that if the Respondent did not have work for him, no obligation to pay a statutory redundancy payment would arise. I find that the intention of the 'one month off' was to bring about a break in continuity of employment to deprive the Claimant of redundancy and other entitlements, and that this was deliberately not made clear to the Claimant at the time.

24. In all the circumstances, I find that when the contract dated 19 October 2017 was sent out referring to the start date of continuous employment as 2 October 2017, this amounted to a serious breach of the duty of trust and confidence.
25. That contract included other matters that were less favourable to the Claimant than his original contract of employment had been, including his notice period and his entitlement to sick pay.
26. We had a lot of evidence about the title of site manager given to him and whether that amounted to a demotion. I find that Mr Magnus' evidence was very clear about the hierarchy that operated on site. A site manager would report to the project manager unless there was none on site. I take into account the fact that the Claimant had always had the title of project manager. I am also concerned by the fact that this change in title was not discussed with the Claimant during his discussions with Mr Elster and is not referred to in any of the letters setting out proposals for the future arrangement. It is only referred to when the first contract was sent out and I accept and understand why the Claimant perceived that to be a demotion. The Respondent sought to argue that there is little difference between the titles and that sometimes site managers can operate as project managers, but that begs the question as to why it was necessary to make a change at all. The Respondent explained that it might not be appropriate to have the Claimant operating as the lead on site due to his commuting distance but that does not adequately explain why a change in title was necessary.

27. In his letter of objection on 31 October, the Claimant raised his concerns about the loss of continuity of employment, the change in job title and his notice pay. In his response Mr Elster made it clear that he was not prepared to change his position. I agree that the letter does say that the Claimant could revert to his old contract (the effect on continuity is not made clear) but also stated that he would have to be prepared to work anywhere and suggested that no allowance would be made for his change of residence. finally he was offered travel arrangements that were far less advantageous than those he had enjoyed previously.
28. I therefore find that the terms of the contract sent out on 19 October 2017, insofar as they had not been discussed and agreed with the Claimant in advance and bearing in mind that the Claimant had already started working under the new arrangements, amounted to further breaches of trust and confidence. However, I accept that the proposed new terms set out in the contract were accepted by the Claimant in his email of 11 November 2017. Albeit reluctantly he decided to proceed on the basis that he would accept a new job title, new sick pay arrangements and new notice pay. Of course, in doing so Mr Warburton was also purporting to accept that continuous employment had been broken and had started again on 2 October 2017, although of course that is a matter of law not of contract, and it is doubtful that he could affirm the 'break'. The Respondent has in any event sensibly conceded during the course of these proceedings that continuity had not in fact been broken.
29. So, I find the position at 11 November was that the Respondent had been responsible for serious breaches of the duty of trust and confidence but that these breaches had to some extent been affirmed.
30. What about the events that took place after the 11th November 2017? In his evidence the Claimant has suggested three matters that he was unhappy about that occurred during January 2018. First off all he took time off sick in January and was only paid statutory sick pay. He accepted that he had not appreciated

when he had seen the written contract that the sick pay provisions had changed and that in the future he would only get SSP.

31. At the start of these proceedings it was argued that the removal of the fuel card on 3 January 2018 amounted to a further breach. During his closing submission Mr MacCabe accepted that under the terms of the employment contract which Mr Warburton had signed in 2006 the Respondent had the right to withdraw the fuel card. He states that he does not seek to rely upon the removal of the fuel card as a further breach of the duty of trust and confidence in 2018. So that leaves us with the matter of timesheets.
32. It is not unreasonable for an employer to require timesheets from a person who is being paid at a daily rate. If the requirement had been introduced at the outset of the new arrangement on 2 October 2017, I do not believe that this would have been an issue.
33. The requirement to complete timesheets was introduced without any explanation on 3 January 2018 in a short email from Human Resources. It is appropriate to consider the imposition of this requirement in the context of all the changes in role that were introduced and in particular in the context of the change in job title from project manager to site manager imposed upon the Claimant in November 2017, albeit that that change in job title had been accepted by him.
34. I take into account that this was not an arrangement whereby the Claimant was working on 'ad hoc' days for the Respondent. As Mr Elster said on a number of occasions, the Claimant was being employed on a *project by project* basis. Under the heading 'Hours of Work' both of the written contracts sent out state that the Claimant would be working on those projects on a full time basis. Of course, in this case, Mr Warburton had come to an agreement with Mr Magnus to work shortened hours while he was working on the Westminster School Site, but essentially he appears to have been working Monday to Friday on that project. Mr Elster states that the timesheets were introduced to cover weekend working, but in fact the Claimant was not doing any work at weekends. In the particular circumstances of this case the rationale for introducing timesheets in

January 2018 is not clear. I accept the Claimant's evidence that he found the requirement to complete timesheets and have them signed off by a person who was previously his equal in rank demeaning, and that this caused him to believe that the Respondent did not trust him.

35. Mr Bhatt has referred me to the case of *London Borough of Waltham Forest v Omilaju [2004] CA*. I have considered the requirement to complete timesheets in January 2018 in light of the guidance set out in that case. I note the extract from this case cited in the case of *Kaur v Leeds Teaching Hospitals NHS Trust* at page 13 paragraph D, which states as follows: 'A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. As it is well put in *Harvey on Industrial Relations and Employment Law*, many of the constructive dismissal cases which arise from the underlying breach of trust and confidence would involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against the background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as constructive dismissal. It may be the last straw which causes the employee to terminate a deteriorating relationship'. That is what I find has happened here. In certain circumstances the requirement to complete timesheets may be entirely reasonable. In the particular context of this case, I find that it is open to question. In all the circumstances I am not able to find that the requirement was a completely innocuous act (*Omilaju*).
36. As stated above, Mr MacCabe has referred me to the recent case of *Kaur*. In that case paragraphs E-G on page 19 set out the matters to be considered by a Tribunal when considering the last straw doctrine.
37. The first question is: what was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her

resignation? Mr Warburton says that is the requirement to complete timesheets imposed on him on 3 January 2018.

38. Second, has the Claimant affirmed the contract since that act? I find that he has not. He did continue working for around another month after receiving the email requiring him to complete timesheets (although for one week of that period he was off sick). I find that simply carrying on working and completing the timesheets does not amount to an affirmation of the contract in this situation.
39. The third question is: if there has been no such affirmation, was the latest act or omission by itself a repudiatory breach of contract? Mr MacCabe concedes that it is not.
40. Question 4 states: if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the *Malik* term? Importantly the case states that if it was, there is no need for a separate consideration of a possible previous affirmation.
41. I find that this is a case that sits squarely within the framework for considering a 'last straw' that is set out by *Kaur*. There were breaches of trust and confidence that occurred in the autumn of 2017 after Mr Warburton had started work under his new arrangement with the Respondent. Despite his misgivings he accepted the proposed changes and affirmed the contract on 11 November, but he complains about further matters that occurred in January 2018. The matter relied upon as the last straw is the requirement to complete timesheets that was imposed upon him in the email of 3 January. In all the circumstances, I find that this was an act that was demeaning for a long serving member of staff who held a position of responsibility. It was not imposed on any other project manager or site manager. I accept that by this time Mr Warburton was working under a different arrangement with his employer but the reason why the timesheets became so necessary in January 2018 has not been made clear by the Respondent. Combined with the concerns about the change in job title and contractual entitlements in November 2017 and of course the purported attempt

to break continuity of employment in October 2017, I find that these matters cumulatively amount to a repudiatory breach of the *Malik* term.

42. I must then go on to consider whether the Claimant resigned in response to the breach. I find that he did. I note that the Claimant was looking for alternative work on 29 November 2017. This is perhaps not surprising given that he was very unhappy with the terms that he had eventually been forced to accept, but he felt that he had no other option at the time. I accept Mr Magnus' evidence that the Claimant informed him that he had the opportunity for local work in Lincolnshire. I accept that the Claimant may have delayed resigning until at least he had the possibility of other employment, but that in this case does not alter the fact that I find the reason why he did resign was the course of conduct by the Respondent that commenced in October 2017.
43. I therefore find that the Claimant was dismissed. Was there a fair reason for the dismissal? The Respondent says that if the Claimant was dismissed, there was a substantial reason for dismissal, namely the need to balance the Respondent's interests in light of the Claimant's change of address.
44. The Respondent seems to have acted throughout this matter on the basis that the Claimant's employment could not continue in its previous form because he had moved house. If the Respondent had sought to dismiss the Claimant when he moved for that reason, I suspect that argument would be unlikely to succeed. I do not accept the evidence of the Respondent that the Claimant informed them that following his move he would not be able to work at sites across the UK although I do find that he requested work that he could commute to more easily, given his change in location. I accept that the Respondent did make efforts to agree new terms with the Claimant that could have led to an acceptable arrangement going forward. It is difficult to understand in this case why the Respondent felt it had to go through the attempt to break continuity of employment and start what it viewed as an entirely new contract of employment when it could simply have agreed a variation of the existing contract. For whatever reason that did not happen. The Respondent sought to impose significantly less advantageous terms upon the Claimant without

communicating clearly what it intended to do until the contracts were produced. Whilst I accept that there were some business reasons for wanting to negotiate a change in terms with the Claimant, the content of the changes and the manner in which they were introduced was not reasonable. I find that in all the circumstances the dismissal was unfair.

45. I come to the question of remedy. The Claimant's evidence is that he has been unable to find other work since he left his employment with the Respondent. He says that he believes his age is counting against him. His evidence was that he has registered with a number of agencies and he sent his CV to two local construction companies. He has applied for a couple of jobs but has been unsuccessful. In all the circumstances I do not find that the Claimant has made reasonable efforts to mitigate his losses. It seems clear from Mr Magnus' evidence that there was some possibility of work in the Lincolnshire area and either the Claimant started that job and decided that it was not for him or he decided to reject it. It is not completely clear why that opportunity was not taken. There has been very little effort to apply for other jobs. The Claimant seems to have operated on the basis that having registered with a couple of agencies he would just wait to be notified of suitable vacancies. He says that none came up. I do not think that is an acceptable explanation in all the circumstances. Simply registering with employment agencies is not enough to satisfy the duty to mitigate. I would have expected to see the Claimant approaching companies direct, responding to vacancies directly and making a far greater effort to find other work. I do accept that at the age of 67 on a reasonably high salary it might have taken longer for the Claimant to find work than other people. I accept that there may have been few vacancies at a level of seniority and at a salary that he enjoyed previously, but the Claimant had also moved out of London and might have been expected to look for work at a lower salary in his local area, avoiding the costs of commuting. I find his efforts to mitigate his losses are not sufficient. In conclusion I have decided to award a basic award of £8,802.00, I award a compensatory award calculated on the basis of 12 weeks loss of net earnings because I find that would be a reasonable period for the Claimant to find other work. That comes to

£14,103.60. I award him the sum claimed in respect of loss of statutory rights of £480.00. That comes to a total award of £23,385.60.

Employment Judge Siddall
Date: 8 March 2019