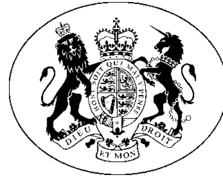

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Kevin McDonnell	**v**	**Atlas Facilities Management Ltd**

Heard at: Watford **On**: 2 January 2019

Before: Employment Judge Bedeau

Appearances

For the Claimant: Mr N Williams – of Counsel
For the Respondent: Ms L Broom – Senior Human Relations Advisor

JUDGMENT

1. The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay him the sum of £25,731.64.

2. The claimant's unauthorised deduction from wages and accrued unpaid holiday claims are dismissed upon withdrawal.

REASONS

1. By a claim form presented to the Tribunal on 23 April 2018, the claimant who worked for the respondent as a window cleaner, claims against the respondent constructive unfair dismissal; unauthorised deductions from wages; and accrued unpaid holiday.

2. In the response presented to the Tribunal on the 12 June 2018, the respondent avers that there were in fact economic, technical, and organisational reasons why the decision had been taken to no longer allow the claimant to drive the company's van from home to work and back home. It also made an application to strike out his claims on the basis that they are scandalous, vexatious or unmeritorious.

3. The case was initially listed for hearing on 12 September 2018, but the Tribunal could not accommodate it due to the lack of available judicial resources. It was then listed for hearing today.

The evidence

4. I heard evidence from the claimant. On behalf of the respondent evidence was given by Ms Lysette Broom, Senior Human Relations Advisor. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 63 pages. The claimant produced a smaller bundle of documents more relevant to the issue of remedy.

The issues

5. Counsel for the claimant produced an opening note setting out, very briefly, his understanding of the factual background, but more importantly, the legal claims and issues in the case. The claimant is pursuing an automatic unfair dismissal claim under Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 "TUPE" and constructive unfair dismissal under Section 95(1)c, Employment Rights Act 1996. There is also, potentially here, serious consideration of Regulation 7(1) of TUPE, namely whether or not the reason for the claimant's resignation was closely connected to the transfer.

Findings of Fact

6. The respondent describes its business as being engaged in cleaning windows, specialist pest control and integrated solutions services to clients throughout the United Kingdom. Its clients include corporate and commercial, leisure and fitness, hotels, restaurants, theatres and iconic venues.

7. The claimant commenced employment on 6 October 2014 and at that time he worked for a company called Emprise Services Plc. They had offices at 186 City Road, London and a depot in Croydon.

8. The claimant's job was that of a window cleaner. In his terms and conditions of employment which he signed with Emprise Services Plc on 13 October 2014, under "variation", paragraphs 34 and 35 states the following:

> "34. The employer reserves the right to make reasonable changes, amendments and corrections to any of the terms contained herein (including appendices) by notice in writing to you. The company advises that similarly whilst the staff handbook is not a part of your contract, it will also be regularly updated and that you are contractually obliged to follow its provisions.
>
> 35. No alterations or variations shall be made to your contract of employment unless they have already been agreed by the parties and such alteration and/or variations have been confirmed in writing. At least 4 weeks' notice will be given of such changes."

9. The claimant said that he had was given use of Emprise's van to carry out his work. He told me and I accepted his evidence, that inside the van would be stored the equipment he would use in the course of his work.

10. It was agreed at the outset of his employment with Emprise that he would be allowed to take the van home and drive it from his home to the sites where he would be working with his work colleague, Mr Alan Archer. He would then return home driving Emprise' vehicle.

11. As he could not be certain where he would be working on any given day, it was agreed that his working time would start from when he would leave and return home. In doing so, fuel costs would be met by Emprise. I was prepared to accept that that was the agreement.

12. In May 2015, he was due to move residence from Bromley to Broadstairs in Kent, which is approximately 80 miles away from central London where he mainly worked. He informed Mr Richard Emmanuel, Operations Manager, about his move who agreed that he, the claimant, would continue to use Emprise's vehicle from his home to where he would be working and back home.

13. Mr Emmanuel sent an email to the claimant on 5 September 2018, confirming the agreement they had reached at the time with the claimant. He was, however, not called to give evidence. (page 63 of the bundle).

14. Mr Emmanuel did not refer to having agreed to meet the fuel costs. That evidence comes from the claimant and I am satisfied that the respondent's predecessor, Emprise, agreed that the claimant's use of the vehicle from home to his place of work and back, the company would meet the fuel costs.

15. The claimant told me that he was not in a unique position in this regard as that was the arrangement made between Emprise and the other window cleaners.

16. On 26 January 2015, a management note was issued about Emprise's employees use of its vehicles. It made reference to vehicles having a tracker and that any private mileage was to be noted on the mileage sheet and that new vehicles would have a speed limiter. (page 40)

17. On 8 July 2015, Mr Richie Bruce, Office Manager, wrote to the claimant about private mileage use of Emprise's vehicles. It stated that a company's commercial vehicles may only be used for company business and that it may not be used for private use as it would incur tax and national insurance contributions from the driver. The letter also stated that the private use of its vehicles was strictly prohibited. (page 42)

18. This begs the question, what was considered to be private mileage? No definition of that can be gleaned from the documents in the bundle but the claimant told me that from the point in time when the vehicle was left at his home until the time when he returned, was company time or was considered to be company time. Outside of those times, if the vehicle was used by him, it was considered to be private use. In his case, he told me and I accepted his evidence, that he never used the vehicle after it was returned to his

home. In the absence of any evidence that challenged his understanding of private use, I do accept his understanding of what that phrase meant.

19. On 9 November 2017, Emprise's services transferred to the respondent and the claimant, along with his colleagues, were informed of the transfer in a letter dated 10 November 2017, from Mr Mark Beadle on behalf of the respondent. It specifically stated that his existing terms and conditions of employment remain unchanged, likewise his continuing period of employment. (page 43)

20. The claimant had an informal meeting with Mr Brian Spearpoint, Specialist Services Director, Mr Eddie Green, Project Manager, and M Richie Bruce, Office Manager, sometime in early 2018, during which he was expressly told that the respondent was concerned about the cost of fuel and his use of the respondent's van as the apparently high fuel costs involved was of some concern. It was suggested to him that he could buy another car or purchase a season travel ticket but he responded by saying that he could only afford to run the one car already in his family and could not afford a season ticket at the cost of around £5,000 a year. The decision taken by the managers was to spread the cost, by that the claimant understood it to mean that as some of the drivers' expenses were not as high as his, the overall the cost would be spread and borne by the respondent. He would be allowed to continue to use his vehicle on the same terms as before.

21. However, at the meeting held on 12 February 2018, with Mr Spearpoint, Mr Spearpoint altered his position and said:

> "We have got to sort this van out. We cannot keep the current fuel charges. It is not economical, let's face it you've had a good run. We have to take the van off you in three to four weeks and that I'll put it all in writing."

22. The claimant understood that to mean that he was no longer going to be able to use the van as he did before, from home to work and back. He had to make his own travel arrangements. He enquired at the local rail ticket office in Broadstairs and was told that the cost of an annual ticket would be around £5,000.

23. The respondent say that the claimant was written to on 13 February 2018, by Ms Della Wotton, Human Resources Manager, on behalf of Mr Spearpoint, who made reference to the issue of private mileage being strictly prohibited on all company vans. She then wrote on behalf of Mr Spearpoint:

> "I consider four weeks sufficient notice of change and wish to confirm that as from 9 March 2018, you will need to make your own arrangements for personal travel from Broadstairs to the outer perimeter of the M25 at which point you will meet the rest of your team.
>
> If you have any queries regarding the content of this letter, please do not hesitate to contact me." (page 45)

24. The claimant told me that he did not receive this letter. The first time he saw it was some two months prior to this hearing and he was unaware of it at the time he tendered his resignation.

25. On 14 February 2018, he wrote to the respondent, copying in Mr Archer, the following:

> "Please take this email as formal notification of my resignation commencing from the end of this email."

26. The email was acknowledged by Mr Richie Bruce, Specialist Support Services Manager, who invited the claimant to specify a definitive leaving date.

27. The claimant on 15 February 2018, submitted a grievance. He stated that when he was interviewed for his role the issue of travelling to work was raised and it was confirmed that it was not a problem. However, it was again raised by two senior managers who stated that there was not a problem in relation to his continuing use of the vehicle but some two weeks later he received a recorded delivery letter to attend a formal meeting only to be told that the vehicle would be taken off him after three to four weeks which meant that he had to make his own way to work and would have to cover the cost in doing so. (page 48)

28. I have been referred to two emails dated 21 and 22 February 2018. The one on 21 February was from Ms Wootton and it was addressed to Mr Eddie Green, Project Manager. It had also a list of employees including the claimant with their names and work details as well as their addresses. Ms Wootton wrote:

> "Nice chatting with you this evening. As discussed, please see above letter which was sent to all those below in July 2015 from Richie Bruce. You will see that the HR reference numbers correspond with the letter and warns of the consequences of private use and tax liability – this went out to all those below. As I said, I am coming from an HR perspective, but if as you say this may cause further upset then it may well be best left alone, especially if he now has a new position starting on 29 February 2018. I'll discuss with Richard tomorrow morning and confirm thereafter." (pages 51-52)

29. Mr Green responded the following day. He stated:

> "Hi Della. As discussed, I was never made aware of the letters that were sent back in 2015. I was advised "as the company has a national coverage the location of Kevin was not an issue", this was what RB was told by my predecessor. I did enquire during the inception in this role back in early January 2017 and was advised that Kevin spent two of the five days in Bromley where he stayed with his son. As stated, the fact that there was no review or visibility of the tracker system over the past 12-15 months has made controlling fuel expenditure an impossible task. As soon as I was made aware (Atlas) on excessive expenditure, I discussed with Kevin to see if a solution could be sought. However, Kevin was not receptive to any suggestions that were made. I am more than happy to assist in any way that I can to help resolve this issue, but will need more structured approach on what the business require from me. Please advise?" (50-51)

30. On 22 February 2018, Ms Wootton wrote to the claimant but the claimant could not recall receiving the letter, however, he acknowledged that he may have done. The letter referred to his grievance and invited him to contact her to discuss the procedure and to arrange a meeting prior to his leaving on 28 February 2018. (page 53)

31. The claimant told me that at that point in time he felt that it was not going to get him anywhere, thereafter the matter was not actively pursued by him. He resigned because the vehicle was going to be taken away from him and he would have to incur the cost of travelling to work and home which he could not afford to do and submitted his resignation.

Submissions

32. I have taken into account the submissions by Mr Williams, counsel on behalf of the claimant, and by Ms Broom, on behalf of the respondent. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

33. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

34. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that 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. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant 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.

35. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

36. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

37. "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

38. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

39. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

40. I have also taken into account the relevant provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006. In particular, Regulation 3 in relation to relevant transfer, Regulation 4 paragraph 9 on the effect of the relevant transfer on contracts of employment.

41. Regulation 4(9) states the following:

> "Subject to Regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

42. Regulation 7 is on dismissal because of a relevant transfer and Regulation 7(1) renders a dismissal because of a relevant transfer as automatically unfair. It does not become automatically unfair if Regulation 7(2) applies, namely where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

Conclusion

43. I have not been presented with any evidence in relation to changes in the respondent's workforce.

44. I am satisfied that the claimant was allowed to use the company van to travel from home to the various work sites and back to his home. It is clear that concerns were raised about private use of Emprise's vehicles in July 2015 but the claimant said that it did not apply to him and I accept his evidence. If it did apply to him he certainly did not change his ways and was not the subject of disciplinary proceedings in relation to any alleged private use of the van he drove. This, in my view, supports his contention that private use was limited to use of the vehicles for private purposes outside the times when the vehicle was taken from his home and returned to his home. Although not in my findings of fact, he gave as an example, taking his vehicle to the local supermarket as an example of private use.

45. The meeting he had prior to his meeting with Mr Spearpoint did not cause him any concerns as the expenditure involved in using the vehicle from and to his home, was going to be spread across all of the drivers and borne by the respondent. His evidence on this was not challenged by the respondent by calling oral evidence to the contrary.

46. Mr Spearpoint unilaterally decided that the claimant would no longer have use of the vehicle to drive from his home to the various sites and back as he had to make his own way at his own expense. This meant that he would have to pay about £5,000 for a season rail ticket which he could not afford to do. He also could not afford to buy another vehicle.

47. Having regard to Regulation 4(9) TUPE, it was a substantial change and the detriment to the claimant was the cost involved which would come out of his net income. It would have been a significant percentage reduction in his earnings were he to accept such a change. He was entitled to treat the contract as having been fundamentally breached by the respondent. He tendered his resignation without undue delay.

48. The same applies in relation to his constructive unfair dismissal claim. It was a fundamental and unilateral breach, contrary to the provisions in the claimant's own contract of employment in relation to variation. He clearly did not agree to the change and that is clear when you read the grievance he submitted a couple of days later. It was stated prior to Mr Spearpoint's discussion with him, that it would not affect adversely his use of the vehicle, but Mr Spearpoint reversed that decision.

49. The claimant was entitled to take the view that there was a breach of the implied term of mutual trust and confidence as well as a fundamental breach of the terms of his contract of employment in relation to variation as there was no agreement. He resigned without undue delay and I do not find any evidence that he had an ulterior motive in doing so. He was dismissed on 14 February 2018.

50. I have, therefore, come to the conclusion that under Regulation 4(9) the claimant was unfairly dismissed. I also come to the same conclusion that his constructive unfair dismissal claim is well-founded. I am not persuaded that in relation to Regulation 7(2) there was a either an economic, technical or organisational reason for the dismissal.

Remedy

51. The claimant has elected to be compensated. He was born on 3 April 1959 and is 59 years of age. He will be 60 years of age on 3 April of this year. He told me that he has been looking for work and has produced a further statement in relation to issues relevant to remedy. He adduced in evidence a very small bundle of documents setting out the text messages he received and information he obtained about vacancies he applied for. In the initial months following his resignation, he looked at window cleaning jobs as that has been his only line of work as he does not have any other marketable skills or experience. He did not apply for state benefits.

52. After a few months he decided to consider retraining. His preference is in IT and he told me that he would be looking at IT qualifications tomorrow. When asked whether he would be able to use his IT skills, he said yes as there are vacancies in the area where he lives. They are essentially part-time administrative and clerical roles.

53. The respondent submitted that the claimant could have obtained employment within a month following the effective date of termination, namely from 28 February 2018, that being his last working day. The jobs market from March in any given year, improves and according to Ms Broom there is a plethora of security positions. In the absence of any documentary evidence to support that assertion I give it little weight. If there has been a failure to mitigate then the onus is on the respondent.

54. I have seen from the very small bundle of documents the claimant produced, that he did search, unsuccessfully, for a wide variety of jobs, such as, window cleaning, driving, dog walker, warehouse operative, and customer assistant at a supermarket. From 1 September 2018, he secured for himself work as a part-time passenger assistant taking vulnerable school-age children to and from school. He works each school run, between two and two and a half hours a day and earns £24.00 per day. He works five days a week. His earnings in that regard was £120 per week.

55. I have accepted his evidence in relation to mitigation and his employment prospects.

56. While he was working for the respondent his gross average weekly pay was £576.92, his net was £457.32. Having regard to his age, length of service and the statutory maximum, the basic award is £2,200.00.

57. In relation to loss of statutory rights, this was not a lengthy period of employment taking into account the employment prior to the transfer, 3 complete years. I will, therefore, award the sum of £375 for loss of statutory rights. He is 59 years of age. He only knows window cleaning work and that work, I am afraid, is not prevalent within the geographical area in which he lives and now works. With IT training he hopes to acquire new skills which, in due course, may improve his employment prospects.

58. In his case he has limited his loss of earnings to 12 months, £23,780.64 net. In other words, he says that his loss of earnings should be limited to 28 February 2019. He gives credit of £624 being the total sum earned as a passenger assistant.

59. I take the view that the claimant's position here has been reasonably stated. I do have to take into account what is just and equitable bearing in mind his age, his very limited skills, his losses over 12 months from the effective date of termination, namely 28 February 2018. I will award him his 12 months' loss of earnings of £23,780.64 and deduct the sum of £624 he has earned.

60. As I have already stated I will give him an award of £375 for loss of statutory rights as well as the sum of £2,200.00 for the basic award. Adding £2,200.00, plus £375.00, loss of statutory rights, and £23,156.64, loss of earnings, gives the total of £25,731.64.

61. I, therefore, order the respondent to pay the claimant the sum of £25,731.64 in respect of his unfair dismissal.

62. The recoupment provisions do not apply.

63. In respect of his unauthorised deduction from wages and accrued unpaid holiday claims, those are dismissed upon withdrawal.

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Employment Judge Bedeau

Date: 29/03/2019

Sent to the parties on: 29/03/2019

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For the Tribunal Office