



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr David Carr

**Respondent:** Egger (UK) Limited

**Heard at:** North Shields

**On:** 23 & 24 August 2018

**Before:** Employment Judge A.M.S.Green

## **Representation**

**Claimant:** In Person

**Respondent:** Mr E Legard - Counsel

# RESERVED JUDGMENT

The claimant's claim for constructive unfair dismissal is dismissed.

# REASONS

## Introduction

1. The claimant was employed by the respondent at their factory in Hexham for approximately 30 years. The Respondent manufactures wood based panels. The claimant's last role was a Grade 5 Process Operator within the Tongue & Groove department ("T & G"). He resigned on 31 January 2018. After a period of Early Conciliation through ACAS he presented a claim of constructive unfair dismissal to the Tribunal on 22 February 2018. The claim was presented in time; the Tribunal has jurisdiction to hear his claim.

## The claim

2. At the hearing, the claimant confirmed that his claim was as set out in a letter to the respondent dated 7 February 2017 [HB 14], where he claimed the following:

*I've recently left my employment at Egger UK after 31 years and I believe that I've been treated unfairly resulting in me feeling no option but to leave.*

*It had been my intention to work on until Dec 2021 and complete 35 years with the company. I list and explain the reasons below:*

1. *The company's reluctance to accept my request to be relieved of Grade 5 duties due to health concerns.*
2. *Comments made by my manager which I believe to be unfair and untrue and the timing of those comments:*
  - a. *Operators on other shifts being reluctant to work overtime on our shift as they didn't want to work with me.*
  - b. *I wasn't training the men on my shift.*
3. In support of his claim, the claimant averred the following in his witness statement:
  - a. He had a long working relationship with his colleague and friend, Stuart Brown. Mr Brown was the claimant's section leader. They spoke about many things. The claimant had a history of back issues. In March 2017, he complained to Mr Brown that he was suffering pain in his feet and legs. Mr Brown arranged for the claimant to see the respondent's Occupational Health service provider. Occupational Health advised him to change his footwear. Following this, his condition appeared to stabilise for a while. He continued to take paracetamol and he regularly updated Mr Brown about his condition.
  - b. In the autumn of 2017, Mr Brown spoke to the claimant about his retirement and succession planning ("backfilling"). The claimant was clear that he planned to work until 2021, retiring at the age of 67 and reaching his goal of working 35 years for the respondent. Mr Brown spoke of claimant training a replacement Grade 5 Operator. The claimant agreed this would be a good idea to start considering his options. He would speak to his team particularly as he wanted them to become more interested in running the shift which he thought lacked morale. He attributed the low morale to senior management being over involved in the day to day running of the T & G Department. The claimant had previously spoken to Mr Brown about this. Mr Brown suggested that he should raise his concerns with Neil Soulsby, the Plant Manager for Upgrading.
  - c. Because of issues with backfilling, the claimant thought about his own future. His leg and lower back pain was causing him problems and he struggled to perform some of the Grade 5 duties which included minimising downtime and line blockages. He was concerned about climbing and lifting boards to clear blockages which was putting particular strain on his back. The respondent had installed new T & G machinery in November 2016 which was surrounded by a 2m high fence and electronically controlled gates. There were no gantries and walkways to access the machinery which meant that the claimant had to climb in sections where there no gates. There were frequent blockages which he reported. There had also been a serious accident resulting in a man becoming trapped in the machinery; he had his leg amputated.

- d. Because of the climbing and his bad back, the claimant asked Mr Brown if he could be demoted to a Grade 4 position. He would not have to engage in climbing because the Grade 5 Operator would normally be the first on the scene of the blockage. Three weeks elapsed and Mr Brown had not updated him about his request. The claimant asked about the progress of his request and Mr Brown told him that he could not change his duties. He would have to resign his position and apply for another one at the respondent.
- e. The claimant thought that Mr Brown's response was unfair and unusual. He knew of at least three other employees who had been granted changes of duties reasonably quickly following their requests.
- f. He continued to work in his Grade 5 position until November 2017 when he injured his back. He went on 11 days sick leave. During his sick leave, he wrote to Stephen Romano, the respondent's Production Manager for Upgrading on 13 December 2013 [HB 46]. He asked Mr Romano if he could change his duties because of his back issues and the difficulties he faced climbing. He said that he was better suited to Grade 4 duties and his GP agreed with him.
- g. The claimant returned to work on 20 December 2017. He completed the Return to Work Interview with Mr Brown during which he repeated his bad back history. There was no discussion about his request to change duties and the respondent made no offer to support his return to work.
- h. The claimant decided to wait for results of an MRI scan to add weight to his argument. He had worked a shift where he felt that his back pain was manageable.
- i. On 1 January 2018 [HB 50], he texted Mr Brown asking his request to be put on hold until his test results became available. He did not cancel or withdraw his request.
- j. On 4 January 2018, he saw a job advert for Process Operator T&G on the respondent's intranet [HB 51]. It did not refer to grading. He speculated that it might be his own position given his request for demotion. He spoke to Mr Brown, who told him that it was not his job but gave no further details. However, it seemed that this was a Grade 4 position and it was likely that Mr Brown and Mr Romano were aware of it in December when they received the claimant's demotion request. Neither of them raised this position with the claimant.
- k. On 5 January 2018, the claimant spoke to Mr Brown about problems he was having with one of his shift team, David Blanden. Mr Blanden provided overtime cover and was dismissive of the claimant's authority to the extent that he had suggested the matter should be resolved "outside" (i.e. with a fight). Mr Brown told the claimant that he had also spoken to Mr Blanden and said that he had problems getting overtime cover on the claimant's shift because other people were reluctant to work with him. Mr Brown also told the claimant that two members of his shift had complained that the claimant was not training them properly.

- i. The claimant believed Mr Brown's comments were ill timed and unjustified. Mr Brown knew about the claimant's stress and mobility issues and the team's low morale. He did not have an opportunity to answer the complaints. He had told Mr Brown about problems with his team and these had never been addressed.
- m. The claimant went to his GP. In addition to his back pain, he believed Mr Brown was adding to his stress and was not supporting him to do his job. He went on sick leave on 8 January to 31 January 2018.
- n. He wrote to the respondent on 17 January 2017 [HB 54] informing it of his intention to take early retirement. He had spoken to his financial advisor and because of the stress at work, he believed that he had no option but to retire. He was 63 years old, suffered from back problems and would find it almost impossible to find work.
- o. On 19 January 2018, the respondent invited the claimant to a grievance hearing scheduled for 26 January 2018 [HB 56].
- p. Mr Romano and Jenna Wiseman (the respondent's HR manager) heard the claimant's grievance. They discussed the claimant's resignation. Mr Romano said that the respondent could only make decisions regarding his adjusted duties based on medical advice. The claimant was unaware of this. Nobody had told him prior to his resignation. Mr Romano invited the claimant to apply for the T & G position as per the advert of 4 January 2018. The claimant said that he did not know what its grading was. He was invited to apply for the role or another role in Lamination. The claimant regarded this as an offer to apply and not an offer to be moved. He did not think that the Lamination role was suitable and he felt that the respondent was being unfair asking him to apply for roles rather than changing his duties as per his request. The resignation stood.
- q. He has resigned and has taken retirement. He has suffered significant financial loss because of loss of earnings and pension contributions.

#### The response

4. The respondent denies that it has breached the claimant's contract as claimed. It does so for the following reasons:
  - a. The respondent denies that the claimant was constructively dismissed. The respondent did not accede immediately to the claimant's request to move to a Grade 4 position because it required him to formalise his request. The respondent's policy required this. The claimant formalised his request on 13 December 2017. He then put his request on hold and the respondent was expressly told not to take any further action.
  - b. The Grade 5 position did not necessarily involve a greater mobility requirement than a Grade 4 position.
  - c. His managers did their best to support him.

- d. Mr Brown was entitled to raise issues with the claimant about his relationship with his shift team. This was consistent with his role as the claimant's line manager.
- e. The real reason why the claimant resigned was that he was planning to retire. He had taken financial advice and had planned his finances to achieve this. This was not a sudden reaction to problems at work.

The issue for the Tribunal to determine

5. I am reminded that In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:
  - a. 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?
  - b. Has he or she affirmed the contract since that act?
  - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
  - d. If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju [2004] EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
  - e. Did the employee resign in response (or partly in response) to that breach?

Documents and the hearing

6. The parties filed and served an agreed hearing bundle consisting of 194 pages. The claimant and Mr Legard also provided me with written submissions at the end of the hearing. I heard evidence from:
  - a. The claimant;
  - b. Stuart Brown (T&G Lines Section Leader at the respondent) ;
  - c. Stephen Romano (Product Manager for Upgrading at the respondent);
  - d. Jenna Wiseman (HR advisor at the respondent).

The claimant and the witnesses adopted their witness statements. The claimant and Mr Legard made closing submissions. After Mr Legard made his closing submissions, I allowed the claimant 15 minutes to consider what he had heard so that he could prepare his oral submissions in response. I did so in the interests of justice given that the claimant was representing himself. Mr Legard did not object.

Burden and standard of proof

7. The respondent denies that it dismissed the claimant. Consequently, the claimant gave his evidence first. He has the burden of proving constructive dismissal and must do so on a balance of probabilities.

Basis of decision

8. In reaching my decision, I have carefully considered the oral and documentary evidence, the written and the oral closing submissions. I have kept a very detailed record of proceedings which is a near verbatim transcript running to 91 sides of paper. Although I do not propose to repeat its contents herein I have reviewed it in reaching my decision.

The respondent's submissions

9. Mr Legard submitted that he would rely on his written submissions. This case was neither factually or legally complex. He addressed me on the following:
  - a. The claimant's alleged access issues to the machinery were irrelevant to the issues. On the evidence, it was clear that the plant was accessible from all quarters. There were occasions when an operator would have to climb over a fence when it was safe to do so.
  - b. On the issue of the claimant's ill health, he had told Mr Brown about his feet and legs. Mr Brown had acted with alacrity. He had referred him to Occupational Health. The claimant had been provided with appropriate footwear.
  - c. The reality of the shop floor was that the claimant and Mr Brown were very long serving employees who knew each other well. They would discuss their ailments. If the claimant raised a specific issue, Mr Brown acted on it immediately.
  - d. The claimant suggested to Mr Brown that he wanted to move to a Grade 4 position. When he was cross examined on this, he said that the move was motivated by his desire to perform fork lift truck duties. This was the first time that this was mentioned. He had not raised this in his ET1 or at the grievance hearing at the time.
  - e. The employment relationship was a two way street. He was in a senior position and had worked for the respondent for 30 years. He was responsible for telling the respondent important things to enable them to take appropriate action. The respondent was not a mind reader. There was no medical evidence to support that claimant's claim that his move to a Grade 4 position would be good for his health. There had been gaps in the claimant's medical screening but this was not material because when he raised a problem with his feet and legs in 2017, it had been acted upon.
  - f. The claimant had approached Mr Brown but had not explained why he wanted to move. Mr Romano had told the claimant that he needed to follow the company's policy and put in a formal request to move. He

could apply for a Grade 4 role and if he took it, he would relinquish his Grade 5 role. His former position would then be open for others to apply for. That was how the company operated. At no point was the claimant asked to resign.

- g. At the end of November 2017, the claimant strained his back. He submitted his request to move in writing on 13 December 2017. He then sent a text to Mr Brown on 1 January 2018 telling him that he was finding his job easier because he had new boots and he wanted him to put his request on hold. This was fatal to the claimant's claim. He was telling the respondent that he did not want it to progress his request to move to a Grade 4 position.
- h. His written request in December 2017 did not explain how moving to a Grade 4 position would alleviate his mobility problems.
- i. There was an advert posted on 4 January 2018 for a position. It did not say whether it was a Grade 4 position. However, the claimant could easily have asked for more information. It was not his job that was being advertised. He had already told the respondent that he was happy with his job. There was no reason for him to apply for a Grade 4 position.
- j. There was the issue with Mr Blanden. Mr Brown had heard conflicting accounts. He got feedback from the shop floor. He spoke to the claimant in supportive terms about his style of communicating. He was often disrespectful of colleagues and he needed to improve. He struggled to delegate tasks which impacted on training other members of his shift team. He feared that if he delegated, this would impact on the shift's productivity. However, his subordinate colleagues had to learn on the job and he had to trust them when there was a blockage on the line. He had not been subject to any disciplinary action. The respondent had supported him.
- k. At his grievance hearing, the claimant had been offered the chance to return to work and to apply for the position of a Grade 4 Laminator. He had refused the offer.

10. Turning to the evidence, Mr Legard submitted as follows:

- a. The respondent's evidence was of a high quality. The witnesses had been straightforward and open. There was no issue concerning the claimant's credibility; he gave his evidence well.
- b. The claimant wanted the respondent to put his request on hold. The respondent did what he asked. This could not amount to a fundamental breach of his contract of employment.
- c. His evidence concerning access to machinery was a red herring.
- d. His managers were supportive employers. Mr Legard conceded that no employer was perfect and they may have shortcomings. The question was whether on the evidence they had committed a fundamental breach of contract.

- e. Mr Brown was entitled to raise issues with the claimant about his relationship with his team. He had to ensure that the shift and the plant ran effectively and profitably. He would not be doing his job properly if he did not raise issues with a Grade 5 employee.
- f. Turning to causation, what was the real reason for the claimant's resignation? He was looking to retire through financial planning. It was telling that he had resigned with notice. In constructive dismissal cases it was normal to resign without notice. Did this mean that he had affirmed the contract?
- g. Turning to remedy, the claimant had failed to mitigate his loss. He had refused to consider the offer of the Grade 4 position during his grievance hearing. In any event, he would have retired within 18 months.
- h. In his written submission, the claimant states that health and safety was the reason why he resigned. He could not move the reason why he had resigned. This might suggest that he recognised his shortcomings.

I was invited to dismiss the claim.

#### The claimant's submissions

- 11. The claimant said that he wanted to rely on his written submissions. His Grade 5 position required him to climb. He found climbing difficult because of his mobility problems. He raised the issue of the dangers of climbing with Mr Brown in September 2017. Mr Brown was a good supervisor and had referred him to Occupational Health in March 2017. He had made Mr Brown aware of his health problems throughout the year.

#### Findings of fact

- 12. I found the claimant and the witnesses reliable when they gave their evidence. None of them was evasive or vague. They answered the questions that they were asked. I agree with Mr Legard that they were generally credible.
- 13. Having heard the evidence, I have made the following findings of fact:
  - a. The respondent is an Austrian based company. It significantly invested in its operation in the United Kingdom in November 2016 when it installed modern plant and machinery in the T & G Department. It was clear from Mr Romano's evidence that there had to be a high level of senior management involvement when the new machinery was installed and during the early commissioning phase. Staff had to be trained on the operation of the new machinery. This necessarily involved a level of senior management supervision to ensure that the machinery was operated safely and profitably. Senior management was entitled to take such steps and it was unreasonable for the claimant to suggest otherwise.
  - b. The claimant clearly had a long and meaningful relationship with Mr Brown. This was obvious from their interaction when both men were giving evidence. They were not only work colleagues but also friends. They would speak about lots of things at work including health issues.



The claimant told Mr Brown about his problem with feet and his legs in March 2017. Mr Brown immediately dealt with it by referring him to Occupational Health. Occupational Health recommended that the claimant should change his footwear. The claimant took that advice and things greatly improved for him. This is clear evidence of Mr Brown being a supportive supervisor.

- c. The claimant was signed off sick in 2017. He spoke to Mr Brown about moving to a Grade 4 position. He formerly requested the move in writing to Mr Romano on 13 December 2017 [HB 46]. The claimant's allegation that Mr Brown did nothing to progress his request has no foundation. This is because the claimant expressly told Mr Brown by text dated 1 January 2018 that he wanted him to put the request on hold. The text was quoted in an email from Mr Brown to Mr Romano on 1 January 2018 at 10:15 am [HB 50]. It said:

*Over the weekend I have found the job a lot easier. Which I am putting down to new boots and insoles. OF [sic] Stephen has not already advertised the grade 5 job could you ask him to put my request to be taken off grade 5 duties on hold until I see what the Doctor comes up with.*

- d. Mr Romano forwarded this email to Ms Wiseman on 22 January 2018 at 18:35 [HB 50]. I fail to see how the respondent could be criticised for failing to progress matters. It was acting on the claimant's instructions. His request was put on hold.
- e. I do not accept that the claimant was invited to resign his Grade 5 position before applying for the Grade 4 position. Mr Romano's evidence on this point is clear and credible. The company operated a procedure whereby the claimant would have to apply for a Grade 4 position. If he was offered it, he would then relinquish his Grade 5 position. It makes no sense that an employee would be required to jeopardise his or her continued employment by having to resign first and then apply for another position that he or she might not be offered. The claimant's evidence on this point is not plausible.
- f. The claimant's complaint about the intranet advertisement of 4 January 2018 is without merit. Whilst the respondent conceded that the grading of the position was not specified, there was nothing to stop the claimant from asking Mr Brown about the grading. He was a senior employee with many years service and enjoyed a good working and personal relationship with Mr Brown. Furthermore, at that stage, the claimant had already made it clear that he wanted his request to be put on hold. That being the case, there was no reason whatsoever for the claimant to believe that his own job was being advertised. He was still working in his Grade 5 position. On his own admission, things had got better with his mobility and this motivated him to ask the respondent to put his request on hold.
- g. The claimant went off sick from 8 January to 31 January 2018. He decided to resign. He sent a text to Mr Brown on 18 January 2018 which is quoted in an email from Mr Brown to Mr Romano [HB 53]. On 17 January 2018, he set out his grievance [HB 54] and referred to the

possibility of taking early retirement. The respondent wrote to the claimant on 19 January 2018 inviting him to a grievance hearing on 26 January 2018[HB 56]. The claimant attended the hearing. During that hearing, they discussed why he wanted to resign. They offered him a Grade 4 position. He refused the offer and the resignation stood [HB 78].

- h. There were issues with how the claimant communicated with his subordinates in his shift team. He was justifiably proud about how his team performed. It was very productive. This fact that was not in issue. However, from his evidence, Mr Brown had received complaints about the claimant's manner and his reluctance to delegate work. This also included training up other team members. It seems that the claimant struggled to delegate work because he worried about how the team would perform. That is common amongst people in management positions. The claimant is not the first or last person to fall into that trap. Mr Brown was perfectly entitled to raise these concerns with the claimant as his manager and in the way that he did. After all, they knew each other very well and would have trusted each other. Mr Brown decided that it was better to deal with the matters informally rather than through more formal channels such as disciplinary action. He was being supportive and acted as a responsible manager towards the claimant.
- i. The claimant was already thinking about retirement. Indeed he had gone to see his financial advisor. He told me in his oral evidence that organised his finances so that he could take early retirement.

Applicable law

14. Employment Rights Act 1996, section 95(1)(c) ("ERA") provides a statutory definition of constructive dismissal:

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...only 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*

15. The employee may resign with or without notice. What matters is that they are entitled to resign without notice. In practice it is uncommon for an employee to resign with notice.

16. In **Western Excavation (ECC) Ltd v Sharp [1978] ICR 221** Lord Denning said:

*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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*

17. While Lord Denning's reasoning has stood the test of time, the legal landscape in this area has been altered by the emergence of the implied term of trust and

confidence. The distinction between a breach of the implied term of trust and confidence and unreasonable conduct on the part of an employer, while real, is often a narrow one.

18. The following elements are needed to establish constructive dismissal:

- a. Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, and can also arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning.
- b. An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
- c. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to "waive" the breach and treat the contract as continuing (affirmation) (subject to any damages claim that they may have).

### Decision

19. The respondent did not breach the claimant's contract of employment at all let alone commit a repudiatory breach of contract. There cannot be said to have been a constructive dismissal. Indeed, the facts point to the respondent supporting the claimant. He decided that he did not want his request to move to a Grade 4 position to be actioned. He wanted it to be put on hold as his job had improved given his new footwear. The respondent acceded to this and put his transfer request on hold.
20. The evidence points to the claimant struggling to accept that there were issues about his management style and he decided to resign. This was an opportune moment for him to take early retirement having taken financial advice on the matter.
21. On a human level, I know that the claimant will be disappointed with my decision. I wish to add that the claimant conducted himself with dignity throughout the hearing. He prepared and presented his case very well. Mr Legard should also be commended for his professional behaviour throughout the hearing and his courtesy towards the claimant.

He recognised that the claimant was not legally qualified and was a litigant in person and he ensured that the requirements of the overriding objective were met.

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Employment Judge **A.M.S.Green**

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Date 12 September 2018