



EMPLOYMENT TRIBUNALS

Claimant: Mr N Kenny

Respondent: Stitch Design Limited

Heard at: Southampton **On:** 24 and 25 July 2019

Before: Employment Judge Hargrove sitting alone

Representation

Claimant: Mr Curtis, Counsel

Respondent: Mr Stewart, Counsel

JUDGMENT

1. The Judgment of the tribunal is that the claimant was not dismissed and accordingly the claimant's complaints of unfair dismissal and wrongful dismissal are not well founded.

REASONS

1. The claimant was employed by the respondent, initially part-time from 1 March 2010, and latterly from about 2013 he was issued with a statement of terms and conditions and contract of employment naming him as a full-time Warehouse Manager. At that time, he was also appointed a Director. Also appointed in 2013 as a Director and manager was Barry Neves (BN). They were jointly allocated fifty percent of the shares in the respondent company held through a joint company set up by themselves, with Alan MacKay (AM), the founder and Managing Director owning the remaining fifty percent of the shares. AM stepped down as Managing Director in 2014, ceased day-to-day involvement in the operations of the company, and BN took over as MD.
2. On 27 July 2018, the claimant submitted a hand written letter to AM purportedly resigning from his employment (see page 77 of the bundle).

3. On 19 October 2018, the claimant submitted claims of unfair dismissal and breach of contract to the Employment Tribunal. The respondent disputes that the claimant was dismissed.
4. The issues for the consideration of the tribunal were identified and agreed between the parties as follows:
 - (1) Did the claimant resign by reason of the respondent's conduct (the claimant relies on a series of events culminating in the last straw meeting on 26 July 2018)?
 - (2) If yes, is the conduct relied upon sufficiently serious to justify the claimant's resignation, either as a single event or as part of several acts ie did it constitute a repudiatory breach?
 - (3) If yes, did the claimant resign promptly and unequivocally so as not to waive the breach through his conduct?
5. Other issues arise if there is a finding that the claimant was dismissed. In that event the respondent relied upon the conduct of the claimant as effectively either a reason for the reduction of compensation on the basis that the claimant would have been dismissed under a fair procedure in any event, sometimes called the Polkey principle; and/or that the claimant caused or contributed to his own dismissal because of his blameworthy conduct and that accordingly the compensation should be reduced or extinguished altogether. In essence the evidence I have to consider here is principally connected or concerned with issues 1 – 3. In order to establish that he was constructively dismissed in this case the claimant has to satisfy the Employment Tribunal on the balance of probabilities that the respondent was guilty of a breach of the implied term of trust and confidence. There is implied in all contracts of employment an implied term that neither party to the contract will:
 - (1) without reasonable and proper cause,
 - (2) act in such a way as to be calculated or likely to destroy or seriously damage trust and confidence by one in the other. "Calculated" denotes deliberate actions on the part of the employer. "Likely" indicates that an employer may act unintentionally but nonetheless breach the term if, looked at objectively, the employer's actions had the necessary effect. See *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR page 693. The claimant relied upon events occurring in 2016 and 2018 up to 27 July.
6. The relevant timeline is as follows based on the witness evidence from the claimant, and for the respondent, BN and AM, and the documentary evidence in the bundle.
7. On 12 June 2017, an employee Zoe reported to BN that some three days before the claimant had made a sexist remark to her in response to a question from her "are you telling me that the sandwich van is here" to which the claimant was reported to have replied "no I have just been looking at your tits"; and that BN had blanked him in the office that day since she had made it known that she had had a tattoo. Zoe also reported conduct towards another member of staff Jenny Buckley. Having taken legal advice BN issued

a suspension letter on 15 June 2017 and indicated that an investigation would be carried out by AM (page 55 of the bundle).

8. At that stage the allegations were generalised as follows:

“Suspension is being implemented in your case because the allegations involved totally inappropriate and unlawful behaviour, harassment, discrimination, bullying and general behaviour likely to bring the company into serious dispute”
9. AM’s evidence was that he conducted interviews with seven members of staff (pages 57 – 59) including Zoe and Anne-Marie, who described an incident of alleged sexual harassment by the claimant in 2016, which she had decided not to pursue at the time after a discussion with her partner. Both subsequently signed statements describing what they each alleged to have happened to them, on 30 June 2017.
10. Meanwhile on 17 June AM interviewed three other members of staff and met up with the claimant at his house (pages 60 – 61).
11. The note discloses that AM showed the claimant what were described as “redacted” statements or “partly redacted” notes in relation to the other employees.
12. On 19 June, BN wrote to the claimant inviting him to a disciplinary hearing on 24/25 June. He attached copies of the notes referred to above which are the complete notes and not redacted notes. The letter warned of the possibility of dismissal.
13. On 23 June the hearing was put off until 29 June as the claimant had notified BN that he was going to go to the CAB for advice on Friday 26 June.
14. On 29 June, the claimant’s solicitor wrote to the respondent complaining at length about the conduct of the disciplinary process. Having taken further advice from the respondent’s solicitor BN responded on 30 June rescheduling the disciplinary hearing for 3 July and specifying three allegations made by Zoe and Anne-Marie. The letter included their signed statements of that date which described those incidents. AM conducted the disciplinary hearing on 3 July 2018.
15. On 15 July 2017, he issued a final written warning by letter for twelve months. On the same day he wrote what may be described as a placatory side letter (page 72). It is noteworthy that the claimant did not appeal the final written warning.
16. I have considered the claimant’s arguments that the process was instituted with a view to getting rid of the claimant and thus in bad faith and that the respondent had at the last moment taken fright and only issued a final written warning supposedly because of the threat contained in the claimant’s solicitor’s letter. I reject these contentions. I find the following:
17. There were genuine complaints from staff of the respondent which were not provoked or encouraged in any way by BN or AM. Two of them were serious

and capable of constituting gross misconduct under the disciplinary policy in the respondent's handbook. The claimant could reasonably have been dismissed but only received a final written warning. I find it totally unconvincing that a final written warning was issued in place of dismissal because of fears about what was contained in the letter from the solicitors. There is however, some evidence that BN prejudged the issue in the outcome of the investigation letter, even though he was only investigating the allegations and deciding if there was a case to answer, but in any event the claimant clearly admitted the allegations made by Zoe and only said in response to Anne-Marie's allegation that he could not remember it. He expressed remorse. I found the evidence which he gave to the tribunal about his lack of memory in relation to the Anne-Marie incident in 2016 wholly unconvincing. This is not something that he could simply have forgotten about because it was not a trivial incident, nor one where Anne-Marie might have misinterpreted events. It either happened and the claimant's professed lack of memory is false, or it did not happen and Anne-Marie is lying, but the claimant did not deny it or assert that she was lying. His response to the tribunal, to the effect that he thought her complaint was outside a time limit is also equally unconvincing. If the respondent had intended to dismiss the claimant they clearly could have done so.

18. By the time of the disciplinary hearing on 3 July the claimant had clearly been notified of the two specific allegations subsequently found against him and had had ample time to consider them. The claimant did not appeal. The contents of his solicitor's letter had been dealt with insofar as they contained anything which was justified. It mentioned, in particular, that there was no one within the company who could deal with any appeal. That was not a reason for him not appealing because there were steps that the company could have taken to arrange for an appeal to be heard by somebody competent from outside the company.
19. In conclusion, in relation to the events of 2016-2017 I accept that the respondent acted with reasonable and proper cause. There is no basis for a claim that this was capable of being in itself repudiatory conduct in any way.
20. The tribunal then passes on to the events of 2018. The background is as follows
21. In October 2017, AM prepared a note of a discussion which the Directors had about the future of the company which included amongst other things a proposal for a sale of the company's shareholding. AM indicated that he was prepared to share some part of his gain from his fifty percent shareholding. It was emphasised that the discussions were confidential. A potential buyer subsequently came forward in May/June 2018. I accepted that the claimant's attitude to the proposed sale was not consistent throughout.
22. On 6 July BN resigned initially on notice expiring on 17 October 2018. He was intending to go to work permanently with another company for whom he had worked one day per week for about fifteen months. The relationship between BN and the claimant was occasionally testy and I accept that BN did not altogether trust the claimant, although there is evidence that for considerable periods of time they were able to sustain a working relationship. He did not initially notify the claimant of his resignation.

23. Sometime prior to 16 July, BN notified AM of his intention to leave early – on 10 August.
24. On 16 July 2018, a private meeting was arranged offsite at a local golf club. The purpose was to notify the claimant that BN intended to leave and also to discuss the way forward for the management of the company. BN left early and went back to the office and the conversation continued between the claimant and AM alone. The claimant complains that AM threatened to punch him in the face. AM agrees that he did say words to the effect that he could be forgiven for wanting to punch the claimant in the face. He explains the circumstances in which he made that remark in some detail in paragraph 15 of his witness statement.
25. I accept that the claimant reported his version of the remark to BN back in the office that day. I do not accept the claimant's contention that this was in any way a serious threat of immediate violence. I accept as far more likely the explanation given by AM who is 74 years old, or was at the time. I accept AM mentioned the level of animosity shown by the claimant towards him, to which the claimant responded by making irate accusations that AM had "rubbished his life" back in 2017, a reference to the giving of a final written warning which, as I have indicated, was entirely justified. AM had merely expressed concerns that the claimant had cold shouldered him since 2015. The claimant's response was an unjustifiable response, to which AM reacted, but not in a manner as to constitute a genuine threat of violence.
26. It is highly significant that the contents of paragraph 20 of AM's witness statement is not in dispute. Even after the alleged threatening remark had been made the conversation continued; it was agreed between AM and the claimant that a management committee would be formed of staff who would be concerned in the management of the company in the future after BN left; and the claimant and AM shook hands at the end of the meeting. That does not demonstrate in any way that the threat was taken by the claimant at the time in any way as a serious threat of violence.
27. BN arranged a meeting with AM in his office on 25 July 2018. There is a fundamental issue as to the nature and purpose of that meeting. The respondent's case is that BN had been approached by Jo Healing, the Office Manager who reported that JR, another member of staff, had found the claimant's recent treatment of her intolerable and she was intending to resign. Further, according to BN, he approached JR, who confirmed the truth of the allegation. Secondly, another employee Liza W had told BN - they worked together in an open office - that she was fed up with the claimant and would be leaving especially as the staff had now heard BN that was leaving.
28. The respondent's case that it was decided to suspend the claimant and hold a further investigation into his conduct leading to two members of staff threatening resignation in 2018. Accordingly a letter of suspension was drafted using the last suspension letter of 2016 as a template with suitable alterations, and it was arranged for AM to have a meeting with the claimant to notify him the next day on 26 July.

29. That meeting took place in the rest room of the respondent's premises on 26 July. There is a further fundamental conflict of evidence. The claimant claims that it opened with AM telling him that he no longer wanted the claimant to work for the respondent. Unless he resigned he would be suspended with a further investigation and disciplinary hearing. It was asserted that AM said that complaints had been raised; and that AM had mentioned the source as being Jo Healing and Mandy Brayshaw, (not JR) which the claimant now claims, he knew at that stage to be untrue. In response to this ultimatum, the claimant stated that he would resign as the outcome of any disciplinary process was predetermined by the respondent. The claimant denied that any suspension letter was produced at that meeting. AM's case is that the intention was merely to notify the claimant of the suspension and that the claimant refused to accept the letter. The claimant had resigned immediately on being told that he was suspended. AM contends that he invited the claimant to sleep on it. The next morning AM called another meeting with the claimant. AM claims that he attempted to get the claimant to withdraw his resignation by suggesting that he step down as Director but continued with his employment with his existing pay, and remained a shareholder. The claimant said that it was too late. That demonstrates to me that the claimant had reported to others that he was leaving by that stage. The claimant's case is that AM instructed him to resign and made clear that he should not mention in the letter that he had been forced to resign.

30. I now turn to the terms of the resignation letter at page 77.

“My resignation letter for the past couple of months I have tried my utmost to trust the sale of this company in an effort to save everybody's job. It is an irony that some of those self same people are now clamouring for my dismissal. Once the company is sold the truth will out.

I have only limited enthusiasm working for a company where one Director has a volcanic temper and the other has stated that he is seriously minded to punch me in the face”

31. On these conflicts I accept the respondent's account of events for the following reasons. First, it is highly unlikely that AM would have intended to force the claimant to leave when, as I accept, at that time BN was still due to leave so that there would be no Directors in place. BN's resignation I accept, was not withdrawn until 2 August, coincidentally, I accept, because difficulties arose as to the arrangements with the proposed new employer. Subsequently BN resigned again and did go to work for the new employer.

32. I find it incredible that the claimant would have written the resignation letter in the terms that he did if what he is now saying were true. It is noteworthy that the claimant included the sentence “it is an irony that some of those self same people are now clamouring for my dismissal”. This is totally inconsistent with what he now says that he totally disbelieved that any of the staff had made any complaints against him at all. In addition, it is noteworthy that the claimant was not afraid of making remarks highly critical of the other Directors BN and AM in that letter. It is in my view in the highest degree unlikely that the claimant could have been forced to write a letter against the background of the events which he now claims occurred over the previous

week to ten days. There was no reason why he should not have recounted these in the letter in which case the respondent would have been in considerable difficulties. Finally, I reject as fundamentally improbable that AM, having taken advice did not have a suspension letter with him or produce it at the meeting on 26 July, as the claimant asserts.

33. I have rejected the claimant's version of supposed threats made by AM at the golf club which lacks credibility in itself. I also reject other aspects of the claimant's evidence to the Employment Tribunal as indicating unreliability.
34. I accept that complaints were made by staff as reported by BN. I have not taken into account in reaching that conclusion any failure by the claimant to call or take witness statements from the witnesses because I accept Mr Curtis's argument that the claimant was not made aware at the time precisely what the source of the specific threats to resign by two staff was.
35. I have taken note of the fact that the respondent has also chosen not to call either of the witnesses but that does not mean that I conclude from that failure that the claims of these two members of staff were in fact a fraudulent invention by BN. In short therefore, I conclude that there was no repudiatory conduct by the respondent which justified the claimant's resignation in response. It was a voluntary act on his part.

Employment Judge Hargrove

Date 12 August 2019