



## EMPLOYMENT TRIBUNALS

### Claimant

Mr JH Currie

### Respondent

V Future Communication Specialists Ltd

Heard at: Southampton

On: 29 July 2019

Before: Employment Judge Rayner

### Appearances

For the Claimant: Miss G Churchouse ( Counsel FRU)

For the Respondent: No Appearance

## JUDGMENT

1. The Claimant was unfairly constructively dismissed by the Respondent on 3 December 2019.
2. The Respondent must pay the Claimant damages as follows
  - a. a basic award of £769.20
  - b. unpaid notice pay of £2128.73
  - c. Compensation for loss of statutory rights
  - d. Compensation loss of earnings of £14,280.05.
  - e. The compensation is uplifted by 25% for failure to follow ACAS guidelines
  - f. The sum of £1184.15 is a prescribed amount and must be paid by the Respondent to the DWP upon request /demand.
  - g. The remainder of the amount to be paid to the Claimant on receipt of this order.

## REASONS

### Introduction

1. The Claimant brings a claim for constructive unfair dismissal and wrongful dismissal. He relies upon various breaches of contract which he says amounted to a cumulative breach of contract. The Claimant relies upon a final straw which he states occurred at a meeting on the 30 November 2018.

2. The Claimant was employed by the Respondent company from 1 September 2016 until his verbal resignation on the 3 December 2018. He followed his verbal resignation with a written letter of resignation on 3 December 2018.
3. I have heard oral evidence from Mr Currie primarily from a witness statement in which he sets out the basis on which he claims that he was constructively unfairly dismissed as well as setting out the steps he has taken in mitigation and the losses he has suffered.
4. The Respondents ET3 was struck out by an order dated 12<sup>th</sup> July 2019 following the Respondent's failure to comply with the order of the Tribunal dated 19 June 2019 and did not attend at today's hearing.
5. The order to strike out followed a failure by the Respondent to comply with an order of the Tribunal in respect of specific disclosure. Part of the disclosure requested by the Claimant was in respect of the workplace pension scheme which the Claimant contributed to and the amount of any employer contributions into it.

### The issues

6. The following issues arise for determination in this case:
  - 6.1. Did the Respondent or the servants or agents of the Respondent act in the way alleged by the Claimant by any or all of the following;
    - a. the Respondent failed to provide a written contract of employment between October 2016 and September 2017 did the Respondent failed to provide the Claimant with a job description or any training in any role from September 2016 to December 2018 did the Respondent impose an excessive workload on the Claimant and fail to use provide any support to him
    - b. did the Respondent unilaterally amend the Claimants working hours between December 2017 December 2018 the Respondent or the Respondent is managers acting a bullying manner towards the Claimant or swear at him on occasions between October 2016 in December 2018
    - c. did the Respondent fail to provide a suitable working environment to the Claimant and did any failure cause him to suffer stress at work;
    - d. Did the Respondent act in such a way that the Claimant was reasonable to believe that his employer was behaving in a dishonest and corrupt manner
    - e. did the Respondent don't unilaterally vary the Claimants role and duties of work between October 2018 and December 2018 did the Respondent make unlawful deductions to the Claimant's pay in September 2018 did the Respondent unfairly criticised and demote the Claimant in November 2018 did the Respondent failed to deal with the Claimants and grievances raised by the Claimant between May 2017 and December 2018.
  - 6.2. If so were any or all of these actions either individually or cumulatively in fundamental breach of contract in respect of the implied term of the contract of mutual trust and confidence

- 6.3. Was the alleged breach that took place at the meeting of 30 November 2019 a final straw and/or did the treatment of the Claimant at that meeting amount to a fundamental breach of contract;
- 6.4. Did the Claimant resign because of the breach?
- 6.5. Did the Claimant delay before resigning and affirm the contract?
- 6.6. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?
- 6.7. Was the claimant wrongfully dismissed?
- 6.8. Is the Claimant entitled to a remedy and if so what remedy?
  
- 6.9. What financial award if any should be made and what level of compensation if any should be awarded ?

### Documents and Evidence

7. In addition to the pleadings in this case I have been provided with a witness statement for the Claimant which I have read and which is 16 pages with 20 exhibits. The exhibits include emails sent within the company letters communicating the claimant's change of role emails purporting to vary job roles the claimant's letter of resignation the nondisclosure agreement that the claimant was asked to sign and evidence of the claimants job searches and in respect of his temporary employment.
8. I have also received a helpful skeleton argument on behalf of the claimant and been handed a copy of the judgment in **Harpreet Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA**.
9. I heard evidence under oath from the Claimant.

### Findings of Fact

10. I have heard evidence from the Claimant expanding upon his witness statement and have been referred to documents including those which support his claim in respect of his attempts to find alternative employment. I make the following findings of fact:
  
11. I find as fact that the Respondent
  - 11.1. Failed to provide to provide the Claimant with a written contract of employment following his move to the role of customer service administrator at the Gosport Head Office at any time between October 2016 and September 17 ;
  - 11.2. Failed to provide the Claimant with a job description or any training in any role between September 2016 and December 2018; despite the Claimant requesting both the job description and training;
  - 11.3. Subjected the Claimant to an excessive workload and failed to provide support to the Claimant throughout the period of May 2017 to December 2018, despite the Claimant raising concerns about his workload and requesting support ;
  - 11.4. Unilaterally amended the Claimants working hours on occasions between December 2017 and December 2018 ;

- 11.5. Various managers of the Respondents behaved in a bullying manner towards the Claimant by swearing and using bad language on occasions between October 2016 and December 2018;
  - 11.6. Failed to provide the Claimant with a suitable working environment leading to him suffering stress at work between May 2017 and December 2018 ;
  - 11.7. Engaged in practices which the Claimant considered may be dishonest and potentially fraudulent ;
  - 11.8. Unilaterally changed the Claimants role and duties between October 2018 and December 2018;
  - 11.9. Made unlawful deductions from the Claimant's pay in September 2018;
  - 11.10. Unfairly demoted and criticised the Claimant in November 2018;
  - 11.11. Failed to deal in any way at all with the Claimant's grievances and complaints raised on various dates between May 2017 to December 2018.
12. The Claimant attended a meeting with Francesca Haines and Samuel Johns on 30 November 2018. At that meeting the Claimant was accused of failing to make his managers aware of PAC requests (the codes required by customers who wish to leave the network) which were coming in. The managers told the Claimant that had they known they would have prevented customers from obtaining their PAC codes. A list of codes was provided to the Claimant all of which were cases that had either occurred when the Claimant was on annual leave or of which he was unaware. The Claimant was told that because of this he had failed at his job and had cost the company £17,000. The Claimant was subsequently asked if he had £17,000 spare to refund the company or whether he would work for free.
  13. The Claimant resigned following the meeting, and in response to it on the 3 December 2018 by giving oral notice to his manager.
  14. The Claimant offered to work his notice but was called into a meeting at which he was told by the Respondent he need not work his notice that he would be paid for it in lieu but only if he agreed to sign a nondisclosure agreement. The Claimant signed the nondisclosure agreement but was not then paid for his notice period.
  15. The Claimant took several steps to mitigate his loss and look for alternative work. This included signing on with a number of online agencies and uploading his CV to their sites. He has applied for around 124 jobs in the period from December 2018 until the hearing date of 29 July 2019. His first job applications were made on 5 December 2018 during what would have been his notice period.
  16. The Claimant was able to secure a full-time temporary contract at Future Fit Training Ltd from 24 April 2019. The position will terminate at the end of July 2019. His earnings in this role are lower than his earnings with the Respondent.

17. The Claimant was in receipt of universal credit for a period of time and his schedule of loss states that he received state benefits of universal credit of £1184.15. This amount is subject to the recoupment regulations.

### The Applicable Legal Principles

18. It is for the Claimant to demonstrate that he was dismissed within the meaning of section 95 (1) (c) ERA1996 and section 136 (1) (c) ERA 1996.
19. The test for determining whether an employer is in breach of contract requires a claimant to show that *“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. (Western Excavating v Sharp [1978] ICR 221)*
20. The questions that a tribunal must ask itself in order to decide whether the employee has been constructively dismissed are as follows
  - 20.1. 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;
  - 20.2. Has the employee affirmed the contract since that act
  - 20.3. If not was that act or omission by itself a repudiated re-breach of contract if not was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively, amounted to a repudiated re-breach of the implied term of mutual trust and confidence? If so, there is no need for any separate consideration of a pre-possible previous affirmation because the effect the final act is to revive the right to resign did the employee resigned in response will partly response to that breach
  - 20.4. Did the employee in fact resign in response will partly response to that breach? **(See Kaur v The Leeds Teaching Hospitals NHS Trust [2019] ICR 1).**
21. The last straw does not have to be of the same character as the earlier acts but it must contribute however slightly to the breach the implied term of trust and confidence **(Omilaju v Waltham Forest LBC [2005] ICR 581)**
22. The implied term of mutual trust and confidence means that “ the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship confidence and trust between employer and employee” **( Malik v Bank of Credit and Commerce International SA [1997] IRLR).**
23. The types of acts and omissions which may constitute fundamental breach are not limited but include a unilateral amendment to working hours **(Woods v WM Car Services (Peterborough)[limited 1981 ] IRLR;** a failure to deal with grievances **W A Gould (Pearmak) Ltd v McConnell [1995] IRLR 516.**

## Conclusions

24. The Claimant was constructively unfairly dismissed by the Respondent.
25. I find that the treatment set out in paragraphs 11 -14 above breached the Claimant's contract in that it breached the implied term of mutual trust and confidence and that cumulatively the breaches were of sufficient importance to justify the employee resigning in response.
26. I find that the treatment of the Claimant in the meeting of 30 November 2018 was both a fundamental breach of his contract and a final straw.
27. I find that the Claimant resigned in response to the breaches of contract and final straw set out above and that he did not delay his resignation and did not affirm the contract.
28. I find that the Claimant was wrongfully dismissed in that he was told that he would be paid in lieu of notice but was not in fact paid the full amount to which he was entitled.
29. I find that the Claimant mitigated his loss both during his notice period and throughout the period up until today's hearing.
30. In respect of future loss I am satisfied on balance that the Claimants losses in respect of earnings will continue and should be awarded until January 2020 as claimed in his schedule of loss.
31. I accept that the Claimant made contributions to a workplace pension of £40.00 per calendar month and that it is reasonable for the Claimant to have expected the employer to make contributions of around 2.4% in addition. The Claimant has attempted to find out the factual situation by asking for specific disclosure which the Respondent has failed to provide. in the circumstances I find that it is reasonable to award pension loss on the basis of an employer contribution of 2.4% as set out in the Claimant's schedule of loss.
32. I find that the Respondent unreasonably failed to comply with the ACAS code in respect of grievances by failing to deal with any grievance raised by the Claimant at any time.
33. I find that the Claimant has lost the benefit of rights accrued after two years continuous employment which are protection from unfair dismissal and the right to at least four weeks notice of termination of employment.
34. The Claimant is therefore entitled to damages for breach of contract, compensation for loss of statutory rights compensation for loss of earnings and an uplift of 25% for the Respondent's failure to follow the ACAS code.
35. I therefore make the following award:

**Basic award**

36. 2 weeks pay of £384.60 **£769.20.**

**Notice Pay**

37. The Claimant is awarded the figure of £1703.78 in respect of notice which is subject to a 25% uplift for the employer's failure to follow statutory procedures of £425.95.

**£2128.73.**

**Compensatory award**

38.	From 4 January 2019 to 29 July 2019 loss of net earnings	£9340. 49
39.	loss of statutory rights including long notice - 3 weeks pay	£769.20
		£317.38
40.	loss of employer contributions to the workplace pension scheme	£224.05
41.	For loss of earnings for the period 30 July 2019 to 3 January at £317.38 per	£7026. 79
42.	Future loss of pension at 2.4% (taking account of contributions from current employer )	£206.40
43.	The total compensatory award for past loss to date of hearing is	<b>£10651.12</b>
44.	the total compensatory award for future loss is	<b>£7233.19</b>
45.	the total compensatory award for future loss is	<b>£17884.31</b>
46.	The Claimant's earnings from his current employment are	<b>£7831.32.</b>
47.	The total figure for future loss is	<b>£10,052.99.</b>
48.	I award a 25% uplift for the employer's failure to follow statutory procedures of	<b>£2513.28.</b>
49.	The total compensatory award is therefore	<b>£12,566.27</b>
50.	The total amount to the Claimant is <b>£14280.05</b> . This figure is subject to the Respondent's obligation to account to the DWP for the sum of <b>£1184.15</b> which is the prescribed element, which is the universal credit received by the Claimant. The Respondent is referred to the annex to this judgment.	

51. The Respondent will pay the amount of **£1184.15** to the DWP upon request and will pay the remainder of **£13,095.92** to the Claimant.
52. The Claimant's national insurance number is JJ013501B
53. Miss Churchhouse requested written reasons for the Judgment.

**Employment Judge Rayner**

Southampton

Dated: 29 July 2019