EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Barrett

Respondent: Ladbrokes Coral Group

Heard at: London South, Croydon
On: 6 August 2019 and the 16 August 2019 in chambers

Before: Employment Judge Sage
Representation

Claimant: In person

Respondent: Mr. Isaacs of Counsel

RESERVED JUDGMENT

The Claimant's claim for constructive unfair dismissal is not well founded and is dismissed

REASONS

1. By a claim form presented on the 1 April 2019 the Claimant claimed constructive unfair dismissal after his career break was refused after it had commenced.

2. The Respondent denied that the Claimant was constructively unfairly dismissed and denied that there was a fundamental breach of contract that entitled him to resign and treat himself as dismissed. The Respondent stated that the Claimant commenced work for IKEA on the 5 November 2018, whilst claiming to be on a career break. This was dishonest and would have been a fundamental breach of his contract which would likely have resulted in the Claimant's dismissal.

The Issues

3. The burden of proof is on the Claimant to show that the Respondent acted in such a way that was calculated and likely to damage or destroy the

relationship of trust and confidence between the employer and the employee.

4. The Claimant confirmed at the start of the hearing that the conduct he relied upon was as follows:
    a. that grievance and disciplinary hearing were being heard at the same time:
    b. the constant accusation against the Claimant of not communicating with the Respondent:
    c. the increasing workload in June 2018:
    d. the lack of acknowledgement of the duty of care to him.

5. The Claimant must show that the above conduct amounted to a fundamental breach and he resigned as a direct result of this conduct and did not delay in resigning.

The Witnesses

The Tribunal heard from the Claimant.

For the Respondent the Tribunal heard from
Ms. Friend the Employee Relations Adviser.
Mr Curliss the Temporary Area Manager
Mr Griffiths, Marketplace Manager.
Mr Hammond, Marketplace Manager

Findings of fact

6. The Claimant commenced employment with the Respondent in 1995, initially working as a cashier and was then promoted to shop manager, which was the role he held at termination.

Policies and Procedures

7. The Respondent had a grievance procedure which required employees to discuss matters informally with their managers before escalating to the formal grievance process. The Tribunal saw the grievance procedure in the bundle at page 49 which set out the steps that had to be followed.

8. The Tribunal saw the career break policy which required the employee to apply for an unpaid career break of between 3-12 months in writing "at least 3 months before the proposed commencement of the break" (see page 42). At paragraph 4.3 it stated that *"once we have received a colleague's application, we will arrange to meet with a colleague to discuss their request*". The policy at paragraph 5 went on to state that the career break "*will be confirmed in writing*." Employees were warned at paragraph 5.2 that a colleague should not commit themselves "*unless their application has been approved in writing*". The Respondent retained the right to refuse a request for a career break and the grounds on which an application could be refused were set out in paragraph 6 of the policy. In paragraph 8.9 of the policy it stated that "*during the career break, the colleague remains employed by the Group under their existing contract of employment and as such unable to engage in new work (paid or unpaid) without the prior permission of the Group".*

9. Although the Claimant raised concern about the new online systems in place in the Mottingham branch where he worked, which was seen in an email dated 3 May 2018 on page 58, he accepted that he did not raise a grievance at the time but discussed it with his Area Manager. There was also no evidence that he had cause to complain after that date about the workload or the conditions in the workplace.

10. The Claimant took time off sick for anxiety and depression following the death of a relative starting on the 17 May until 9 July 2018. On the 27 June 2018, Mr Demetriou, the Claimant's manager met with him at his home to discuss the return to work and any requirements that were needed.

11. The Claimant expressed concern that on his return to work that he was going to be moved to a busier shop which would increase his workload, which was his third move that year. The Claimant accepted in cross examination that his contract of employment included a term which required employees to be mobile. The Tribunal saw the contract at page 38 of the bundle requiring employees to work within a reasonable travelling distance of the employee's normal place of work. It was not suggested that the move from Mottingham to Eltham was outside of a reasonable travelling distance.

12. The Claimant sent an email dated 21 July 2018 seen at pages 77 to 78 of the bundle complaining about a few matters that he felt needed to be addressed, such as blocked toilets and rubbish not being thrown away. He commented under the heading "health update" that "*shop now seems to be on an even keel. I was hoping to see you as soon as you'll have a chat with me on my return. Had a health review yesterday (see below), I need to speak to you about my hours, requesting a three day week (will discuss options with you).*"

13. On 25 July Mr Demetriou met the Claimant for a review meeting, the notes of the review confirmed that a phased return had been agreed and he went on to confirm that "*I will agree, as stated in the flexi policy to work a day less of your contract for a month from Monday 30th July and review the agreement on Monday 27th August*." The note also recorded that the Claimant's move to a different location had been confirmed to take place on the 13 August 2018 (see pages 79 and 82). The Claimant did not raise a grievance at this stage because it was his evidence that he was "told to go." He stated that the move to the Eltham branch (L1972) would double his workload. Although the Claimant said he objected to this move to his line manager, there was no evidence of this in the bundle.

14. Although the Claimant referred in his witness statement to struggling with his work whilst still under treatment for stress and anxiety and experiencing a number of distressing incidents at work, there was no evidence to suggest that he raised concerns about his workload or that he requested support. The Claimant told the Tribunal that his priority was to keep the shop going and he felt that the employer knew he was having treatment.

15. In August 2018, the Claimant applied to work full-time at IKEA, he was interviewed and offered a position, which he accepted. He told the Tribunal that the reason he attended an interview was that it was part of his CBT training as he had been encouraged to try new things. The Claimant told

the Tribunal that this was a full-time role but on less salary. He was offered a position with the start date of 12 November 2018.

16. Mr Demetriou left the business on 28 September 2018 and Mr Curliss became the Claimant's new line manager.

The Career Break Application.

17. On 4 October 2018 the Claimant applied for a career break and the Tribunal noted that this was after had accepted a full time role at IKEA. The Tribunal saw the Claimant's application on the relevant form at pages 47 to 48 bundle. The request was to start a one-year career break commencing on 5 November. The Claimant gave only one month's notice in breach of the requirement to apply giving a minimum of three months' notice. The reason he gave for wanting to take a career break was to "*pursue other interests, management studies and some travelling*," he made no mention of his intention to take up a role in IKEA on this form.

18. The Claimant denied it was his objective to work full-time during his career break and insisted it was his intention to go travelling, however there was no evidence that he took any steps to arrange any trips or to undertake any management courses. The Tribunal find as a fact that the Claimant intended to work full time when he started his career break which was a breach of the policy which forbade employees from undertaking any paid work during the break unless it had been approved. He accepted he never told the Respondent at any time before his resignation that he was working full-time at IKEA during his career break.

19. It was the Claimant's evidence to the Tribunal that he felt that he had agreed his career break with human resources. However, it was put to him that once the form had been submitted, it had to be agreed, the Claimant replied that he was under the impression that human resources didn't "see it as an issue." There was no evidence before the Tribunal that his career break application had been agreed. The Claimant appeared to be under the impression that as HR didn't say he couldn't take the leave, that was an indication that there was no objection to him taking the leave. He told the Tribunal that HR said the timescales would be fine even though the policy required an application to be presented 3 months prior to taking the leave. The Claimant said he was told that after 23 years "he deserved it" and they told him that they would rush it through. He stated that he relied on HR to tell him that he could not take a career break.

20. Although the Claimant had not received confirmation that his career break application had been approved, he emailed Mr Hammond on the 16 October 2018 attaching the paperwork he had submitted for his career break and his email stated "just to update you on upcoming career break" (see page 93 of the bundle). Mr Hammond then forwarded this email on to Mr Curliss for his information indicating that he was not aware of the application. The Claimant said he sent this to his managers because he had not received a rejection of his application and had assumed that it was approved, even though he had not received written confirmation to that effect.

21. The Claimant's application for a career break was rejected on the 3 November 2018, 2 days before it was due to start (page 98-9 of the bundle).

Mr Curliss then emailed HR to confirm that the career break had been rejected due to the fact that the Claimant had not asked him directly and had not given the correct notice. Ms. Friend told the Tribunal that no rejection letter had been sent to the Claimant because they would wait for the manager to discuss the outcome with the employee when they would be informed of their right to appeal, after that meeting the letter would be sent confirming the decision to reject. The Claimant told the Tribunal that he was not aware of the rejection or of any of these emails as they were produced after he had left on his career break. He accepted that there were "procedural breaches on both sides" in respect of his application. The Claimant accepted in cross examination that with hindsight he would have waited for written confirmation that this leave had been approved before starting his career break, but he couldn't turn back time.

22. The Claimant left on his career break on 5 November 2018 without receiving written approval, which was a further breach of the policy. The Claimant accepted that around this time there had been a breakdown of communication between himself and the Respondent.

23. The Respondent wrote to the Claimant on 26 November 2018 expressing concern that he had been absent from work since 5 November and informed him he was currently considered to be on an unauthorised absence and was not entitled to be paid. He was asked to contact the Respondent to discuss his position.

24. The documents in the bundle reflected that the Claimant had not made contact with the Respondent by 3 December 2018, therefore, the Respondent again wrote asking for the Claimant contact them using a mobile number that was provided in the letter. The Claimant was again reminded he was on unauthorised and unpaid leave. The Claimant emailed HR on 6 December 2018 informing them that he was on a year's sabbatical. The Claimant confirmed in cross examination that he could understand why the Respondent wanted to speak him.

25. The Respondent sent a further letter to the Claimant on 11 December 2018 (page 131) informing him that the career break had been declined due to "not giving adequate notice and the career break not being able to be supported by the business." The Claimant was again asked to contact his line manager using the mobile phone number provided in the letter. The Claimant accepted that by this stage, he still had not contacted his line manager to have a discussion and he had not been in contact with the Respondent to discuss his absence.

26. The Respondent sent a further letter dated 13 December 2018 asking the Claimant to attend a meeting with Mr Griffiths on 17 December 2018 to discuss his unauthorised absence. He was warned that the meeting may result in disciplinary action being taken, which could include dismissal. The Claimant was informed of his right to be accompanied by a member of staff or a trade union representative. The Claimant accepted in cross examination that this meeting was an opportunity for him to explain his position but added that he was not sure what else he could have added to the documents he had already provided.

27. It was put to the Claimant in cross examination that he failed to engage in the process and the reason he gave for failing to do so was that at the time he was undergoing treatment. However, there was no evidence in the bundle that, at that time, the Claimant was undergoing treatment and this was not something he referred to in his statement. The Tribunal also took into account that he was now employed on a full-time permanent contract with IKEA.

28. The Claimant contacted the Respondent by email on 15 December 2018 and this document was seen on page 140 of the bundle. He stated that he contacted the number provided in the letter dated 3 December and left a voicemail. He stated that he would require "adequate time" to make his arrangements and declined the offer of a meeting until he had taken professional advice.

29. It was put to the Claimant in cross examination that the reason he couldn't attend a meeting at short notice was because he was working at IKEA and at first, he denied this. The Claimant then stated that he had to inform his new employer that he would need to attend a meeting with his "previous employer"; he then corrected himself saying 'employer' when referring to the Respondent.

30. The Respondent intended to invite the Claimant to a meeting on the 4 January 2019, however it was accepted that they had failed to send the letter of invitation to him. Ms. Friend confirmed in cross examination that, although it was the intention of Mr Griffiths to convene a meeting on 4 January, this had been overlooked by HR and a letter had never been sent. It was at this stage of the process that Ms. Friend took over the conduct of the case. The Claimant received a text on the 4 January 2019 asking where he was and it was at this stage that the Respondent became aware that the letter had not been sent. The Claimant told the Tribunal that he felt that this was a "clear case of harassment" and he felt that it was indicative of the breakdown of communications between the parties.

31. The Claimant raised a grievance the 4 January 2019 which was seen at page 156 of the bundle. He referred to the "*appalling way in which I've been treated, with regards to the constant pressure and harassment whilst being on sabbatical, this has led to the detriment of my health and well-being*." In the grievance that he stated that he had received a text that day with no name on it and complained that he had received no notice of a scheduled meeting. He went on to state that he wished to raise a grievance and for the grievance to be scheduled prior to attending any meeting to discuss his absence; he also requested that the grievance be handled by someone outside the branch.

32. The Claimant was asked about his grievance in cross examination and it was put to him that he had already telephoned the same number and left a message so he must have known who the text was from, but the Claimant still felt that the Respondent's conduct was unreasonable. The Claimant confirmed that the reference to constant harassment was a reference to the breakdown and breaches of the career break process and the Respondent's conduct after he left on his career break. There was no reference in the grievance to excessive workload.

33. It was put to the Claimant in cross examination by the time he raised a grievance, he had already decided to leave, he denied this. However the Tribunal find as a fact and on the balance of probabilities that by this date he had decided he would not return to work for the Respondent. The consistent evidence before the Tribunal showed that the Claimant had completed his trial period in IKEA and had refused to attend any meetings with the Respondent to discuss his absence. He also indicated that he would not attend any meetings without legal advice. All the evidence was consistent with the Claimant treating the Respondent as his previous employer and IKEA as his present employer.

34. The Claimant was then taken in cross examination to a letter dated 9 January 2019 at page 165, asking him to attend a meeting on the 15 January 2019 to discuss his absence and his grievance. The Claimant was again warned that the meeting may result in disciplinary action being taken against him. The Claimant told the Tribunal that his concern was that the grievance and the investigation would be dealt with the same time and he felt therefore that the handling of the grievance would not be impartial.

35. The Claimant responded to the invitation to the meeting on the 13 January 2019 (at page 167 of the bundle) saying that he would not attend the meeting because he had not been provided with the documentation relating to the decision to refuse his career break. The Claimant again stated that he had made contact with the Respondent and reminded them that he was on sabbatical.

36. The Claimant then emailed Ms. Friend on the 15 January 2019 (page 171) confirming that he would not be attending the meeting. He stated "*I had taken the unpaid career break in good faith, which was discussed with my area manager Nicos on a home visit (along with flexible working). This was part of my phased return to work, after my treatment for Stress and Depression (nursing and then losing a close relative to leukemia). HR assured me over the phone, that the time scales would be fine. I also emailed two MPM's with an update (with pdf of completed form), this was to keep everyone on the same page (email below). This is why I requested the info as to who turned down the request, and when".*

37. The Respondent then wrote to the Claimant on the 18 January 2019, asking him to attend a meeting on the 23 January 2019 (see page 172 of the bundle). The Claimant in cross examination accepted that the Respondent may wish to have a meeting with him but in his view, the relevant information that he had provided about his career break should have been sufficient. It was put Claimant in cross examination that it was reasonable to consider the grievance and the disciplinary matter together they were linked; however, it was the Claimant's view that it "wasn't the right process."

38. The Claimant resigned by letter dated 21 January 2019, citing an anticipated breach of contract, breach of trust and confidence, fundamental breach of contract, last straw doctrine. The Claimant accepted that nowhere in his letter did he mention an increasing the workload as being a reason for resigning.

39. The Respondent then replied to the Claimant's resignation letter firstly on 24 January 2019 (page 76 bundle) where they asked the Claimant to get in

touch to discuss the matters raised in his resignation letter. After receiving no reply, they wrote again on 5 February 2019, again asking the Claimant to make contact. Again, there was no reply.

The Closing Submissions

40. The submissions of both parties were oral and were taken into consideration.
The Respondent referred the Tribunal to the following cases:
Malik v BCCI [1997] IRLR 462
Western Excavating (ECC) Limited v Sharp [1978] ICR 221 CA
Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 839

The Law

Employment Rights Act 1996

95 Circumstances in which an employee is dismissed

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

> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
> (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.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

Decision

41. As confirmed to the parties at the start of this hearing, the Claimant must show that the Respondent committed a fundamental breach, which entitled

him to resign and treat himself as dismissed. Although the Claimant referred to pressure of work, there was little or no evidence in the bundle to show that he had raised this as a concern at the time and he accepted that no grievance was raised. Although it was not disputed that the Claimant had taken time off for depression and was undergoing CBT, the Respondent acted reasonably and allowed the Claimant to work flexibly and to take time off to attend treatment. There appeared to be no outstanding or urgent issues causing the Claimant concern relating to workplace stress or unreasonable expectations placed on him that required any immediate action to be taken by the Respondent. It was also noted that he made no reference to pressure of work when he applied for a career break.

42. Although the Claimant told the Tribunal he relied on workplace pressure in June 2018 when deciding to resign, he did not resign until the 21 January 2019, some 7 months later. The Tribunal conclude that the Claimant by failing to take any action at the time to raise a concern about workload or to take steps to reserve his rights, he affirmed the breach by working on without complaint.

43. Although the Claimant believed that he had been given the impression by HR that his application for a career break for one year would not be a problem, it appeared that he had failed to apply in accordance with the terms of the policy. He had not applied giving the correct notice and there was no credible evidence to suggest that he discussed it with Mr Curliss. Although in closing submissions the Claimant said that his Area Manager was aware of the application, that was not same as discussing the viability of taking one year's career break with his manager, which was a requirement of the policy. The Tribunal also considered that the reason for applying for the career break was not related to workload but was with an expectation of experiencing new things and going travelling. When the Claimant took his break, he was working full time for IKEA, there was no evidence he was intending to go travelling. The terms of the career break required the Claimant to seek permission before paid employment could be taken up and there was no evidence that the Claimant told anyone that he intended to work full time during this break and there was no evidence that he asked for permission. This was a further breach of the Career Break Policy

44. It was not disputed that the Claimant commenced his career break without having received written confirmation that it had been approved. The evidence of Ms. Friend confirmed that the outcome letter was not sent until after there has been a meeting with the employee; it was at this meeting that the appeal process would be discussed. The reason the Claimant had not received a letter rejecting his application was because the meeting had yet to be convened. The Claimant wrongly assumed the failure to communicate with him was a sign that his application was successful (or unopposed). This view was wrong and was contradicted by the express terms of the Career Break Policy. The Claimant commenced his career break without authority and was then considered by the Respondent to be absent without leave.

45. The Respondent then sought to get in touch with the Claimant and sent several letters to him to encourage him to engage, the Tribunal refer to these above in the findings of fact. Although the Claimant responded by email and left a voicemail message, he failed to attend the meetings

convened to discuss his career break application. The Claimant also failed to provide further information about his grievance. The Tribunal took into account that by this stage he had completed his probationary period at IKEA and he had failed to inform the Respondent that he was now working elsewhere. The Claimant failed to engage with the Respondent in any meaningful way after he left on 5 November.

46. The issue for the Tribunal is whether the Claimant has shown that the Respondent has committed a fundamental breach. The first issue in relation to the workload concerns in June 2018 have been dealt with above at paragraphs 41-2, it has been concluded that no grievance was raised and the Claimant affirmed the contract by working on without complaint. It is concluded that the complaint about workload could not therefore amount to a fundamental breach.

47. The second issue is in relation to the complaint about the Respondent's intention to consider the grievance and disciplinary matters together. Although the Claimant asked for the grievance to be heard before he attended a meeting to discuss his absence (and for it to be handled by someone outside of the region) the Claimant could provide no cogent reasons as to why they could or should not be heard together. The tribunal noted that the grievance dealt solely to the way he had been treated while on his unauthorised career break. There was no evidence to suggest that dealing with the two matters together, which dealt with the same evidence, would amount to a fundamental breach of the employment relationship.

48. The third issue that the Claimant relied upon in relation to his claim that the Respondent had committed a fundamental breach was that he was accused of not communicating with them. Although the Claimant objected to this, there was substantial evidence to suggest that he failed to respond substantively to the Respondent's requests for him to attend a meeting to discuss his absence or to contact his line manager. It cannot be a fundamental breach for an employer to wish to open lines of communication with a long serving employee who is considered to be absent without leave. In fact, if an employer failed to make adequate attempts to get in touch, they could finds find themselves being accused of undermining the duty of trust and confidence. Maintaining the relationship between employer and employee by keeping lines of communication open is an essential component of the duty of trust and confidence and the Respondent cannot be criticized for contacting the Claimant to encourage him to engage in the process. This was not destructive of the relationship and could not amount to a fundamental breach. The steps taken by the Respondent to engage with the Claimant were reasonable and proportionate and could not amount to harassment as alleged by the Claimant in his grievance letter.

49. There was no evidence to suggest that the Respondent has committed an act or acts which individually or cumulatively could be conduct that amounted to a fundamental breach. Although the Claimant in closing submissions said that he felt let down after the many years of loyal service, that was his subjective perception. There was no evidence to support his view that the Respondent had acted in a way that, viewed objectively amounted to a fundamental. The employer was doing nothing more than seeking to maintain the relationship of trust and confidence between

employer and employee and to encourage the Claimant to make contact after he left on an unauthorised career break.

50. As the Claimant has failed to establish that the Respondent committed a fundamental breach, it is concluded that he resigned. The Claimant's claim for constructive unfair dismissal is therefore dismissed.

Employment Judge **Sage**

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Date 2 September 2019

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