



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Davidson

**Respondent:** Hoover Candy Ltd

**Heard at:** Manchester

**On:** 12 June 2019

**Before:** Employment Judge Rice-Birchall

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Galvin, Solicitor

**JUDGMENT** having been sent to the parties on 22 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The issues

1. At the outset of the hearing, the issues were agreed by the parties as follows:

#### *Constructive unfair dismissal*

2. Did the claimant terminate his contract of employment in circumstances in which he was entitled to do so without notice by reason of the respondent's conduct?

3. The claimant relied, in general terms, on the manner in which the disciplinary investigation was handled and on his lack of confidence in the proceedings and potential outcome, which he said amounted to a breach of the implied term of trust and confidence. The claimant alleges that the final straw was sending him a confidentiality clause just prior to the disciplinary hearing (which he alleges shows that the decision to dismiss him was pre-determined).

4. The claimant relied on the following which he alleged cumulatively (with the final straw) amounted to a breach of the implied term of trust and confidence: the fact that he was suspended; he had no confidence in the investigation and he felt Mr

Hewitt thought he was lying; there was a lack of support in the investigation meetings given his mental health; there was shouting in the investigation hearing; the claimant did not feel the investigation was balanced and investigated his side of the story (he had asked for other members of the team to be investigated so there would be a more balanced view and felt coerced into giving the right answers) and his conversation with Mrs Edmundson prior to the disciplinary hearing.

5. Further issues to be considered were:

- a. Did the claimant affirm the contract and/or waive the breach?
- b. Did the claimant terminate his contract in response wholly or partly to the breach?
- c. If the claimant was dismissed, was that dismissal fair?

#### *Wrongful dismissal*

6. Is the claimant entitled to notice pay? He says that he was forced to resign with immediate effect and therefore is so entitled.

#### *Breach of contract*

7. Is the respondent in breach of the claimant's contract of employment by failing to pay him a bonus in the sum of £130?

#### **The evidence**

8. I was referred to a number of documents in a bundle of documents. I made it clear at the outset that I would only consider those documents to which I was referred in the statements or by the parties.
9. I heard evidence from the claimant himself and also from three witnesses for the respondent, namely Mr Hewitt, the Training and Continuous Improvement Manager who was also the Investigation officer, Mr Kennedy, from HR, and Mrs Edmundson. All of the witnesses gave credible evidence There were few disputes on the facts.

#### **The Facts**

10. The respondent is a manufacturer of domestic white goods.
11. The claimant commenced employment with the respondent on 27 October 2014. He had over four years' experience when he resigned with immediate effect on 23 January 2019, at which time he was employed as a Customer Services Team Leader. He was passionate about his role, knowledgeable and experienced. He formed a close friendship with his manager, Dawn Edmundson. Sadly, he had, in the past, suffered from some mental health issues but there was no claim of disability discrimination before the Tribunal.

12. The claimant had been appointed to a team leader role on 1 April 2017. That role included coaching, mentoring and training employees in the claimant's team.
13. The claimant was sent a social media policy in or around November 2017.
14. At the beginning of 2019, some allegations were brought to the respondent's notice by a Ms Heaps. There were two sets of allegations, the first related to alleged inappropriate behaviour under the respondent's Dignity policy and the second related to Facebook posts. Ms Heaps brought those allegations to the attention of the respondent through different channels, and, in fact, through Ms Edmundson and the claimant's line manager respectively.
15. When Ms Edmundson raised the allegation of inappropriate behaviour with HR, HR approached the claimant's line manager. By this time, the line manager was already aware of the Facebook allegation that neither Dawn nor HR had been aware of. At that point, the respondent decided to investigate both sets of allegations together.
16. The Facebook allegations against the claimant were that he had posted entries on his Facebook account which were inconsistent with the respondent's social media policy. The first was a link to a Customer Service Adviser role external to the respondent, which had been posted during a period in which the respondent was actively recruiting Customer Service roles and when the claimant was actively involved in that recruitment process. The second was a posting on a colleague, Adele Shields, Facebook timeline made using the claimant's Facebook profile, which included private and commercially sensitive information about the respondent's operational performance which was viewed and commented on by third parties external to the respondent's business.
17. As regards the postings, the respondent felt that it was incompatible with the claimant's role to be advertising a role for a direct competitor and that a reference on social media to the level of service the respondent was providing to its customers could affect the respondent's reputation.
18. Separately, allegations were raised against the claimant by five team members. The complaints arose in the period between Christmas and New Year. The allegations included: abrupt and undermining communication style; unprofessional communication which lacked empathy; and an inconsistent and dismissive communication style.
19. As a result of the allegations made, the claimant was suspended (on 7 January 2019), pending investigation. Mr Hewitt was appointed as the investigation officer.
20. The allegations were clearly set out by the respondent throughout.
21. There was no indication from the correspondence with the claimant at this stage that dismissal would be the outcome, rather the claimant was informed that there was a range of possible sanctions if the allegations against him were upheld.

22. Whilst the claimant remained suspended by the respondent, two investigation meetings were conducted with him. The allegations were put to, and discussed with, the claimant. Breaks were permitted during the investigation meetings.
23. Mr Hewitt also spoke to the five individuals who had made the allegations.
24. As regards the FB postings, the claimant explained that he was trying to post the post in question to a friend but didn't do it correctly and it ended up on his face book page.
25. As regards the allegations of inappropriate behaviour, the claimant said there was a lot of pressure during that period and a shortage of staff and a lot of new staff members.
26. There is some evidence that it may have got a little heated during the investigation meeting at one stage, in the sense that voices were raised, but that episode was short lived and there is no evidence from the minutes that it interfered with the process as a whole or prevented the matter being properly investigated.
27. The investigation concluded on 18 January 2019. Mr Hewitt concluded that there was a case to answer, so the case proceeded to a disciplinary hearing.
28. Accordingly, the claimant was sent an invitation to a disciplinary hearing which clearly set out that the outcome of the subsequent hearing could be any of the following: no formal action being taken, disciplinary action being taken against you, dismissal".
29. It was also clear that the disciplining officer would review the facts independently of the investigation officer, and reach her own conclusions. There was no evidence to suggest the claimant should believe otherwise.
30. The claimant was invited to a disciplinary hearing on 23 January 2019. all relevant documentation was received by the claimant on 18 January 2019. Clearly, and understandably, the claimant found this to be a very stressful time. He says that, at this stage, he was self -medicating on drink.
31. Prior to that disciplinary hearing, the claimant had lunch with his friend, Mrs Edmundson, who very clearly told him that he should attend the disciplinary hearing and put his case forward. The claimant had formed the view, from the conversation with Mrs Edmundson, that a decision had already been made to dismiss him, but there was no evidence that that was the case, or indeed that that was Mrs Edmundson's view. In fact, Mrs Edmundson had, herself, been through disciplinary proceedings but remained employed by the respondent. What she had said was that she was disgusted with way the claimant had been treated, which the claimant misinterpreted to mean that a decision had already been reached and that his employment would be terminated.
32. The claimant explained in his claim form that the deciding issue for his resignation, or the final straw, was that the investigating officer sent him a document the day before the disciplinary hearing "regarding clause 19

Confidentiality- any breach of the above will result in summary dismissal for gross misconduct.” The claimant believed that, by sending this to him the day before the disciplinary hearing, the investigating officer was setting the claimant’s expectations of what “the inevitable outcome” of the disciplinary hearing would be.

33. The respondent’s explanation for this document being sent to the claimant immediately before the disciplinary hearing was that, having been through the pack of documents sent to the claimant, it had realised that something was missing and felt under an obligation to make sure that the claimant had had visibility of it.
34. The claimant resigned from his employment with immediate effect on 23 January 2019, before the disciplinary hearing could take place. The claimant’s letter of resignation stated no particular reason for his resignation. The claimant stated clearly during his oral evidence that he did not feel mentally up to dealing with the disciplinary proceedings at the time and said in evidence that he knew that, if he was dismissed, he would struggle to find other work. Those factors, coupled with his belief that the outcome of the disciplinary hearing was pre-determined, and his feeling unsupported by the respondent, lead to his resignation with immediate effect.
35. The claimant further claimed that he was entitled to a bonus of £130. Mrs Edmundson said in oral evidence that he didn’t get it because he didn’t hit the target.

## The Law

36. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states: “An employee is treated as having been dismissed if, but only if, – (c) the employee terminates the contract with or without notice in circumstances such that he is entitled to terminate it without notice by reason of the employer’s conduct.”
37. The claimant must show that the respondent has committed a repudiatory breach of contract. Such a breach must be a significant breach going to the root of the contract (**Western Excavating (ECC) Limited v Sharp [1978] ICR 221**). He must also show that he has left because of that breach rather than for some other reason. The question is whether a repudiatory breach of contract was the main, predominant or “effective” cause of the employee’s resignation (**Wright v North Ayrshire Council [2014] ICR 77**).
38. I referred to the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.
39. The first question is whether the employer committed a fundamental breach of the terms, express or implied, of the claimant’s contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

40. In **Malik & Another v Bank of Credit and Commerce International SA [1997] ICR 606** the Supreme Court (then the House of Lords) held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable or proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is inevitably fundamental.
41. Brown Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 66** describes how a breach of this implied term might arise: “To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”
42. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself does not amount to a breach of contract.
43. In **Lewis v Motorworld Garages Limited [1985] IRLR 465** Neil LJ said that the repudiatory conduct may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said: “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so...The question is, does the cumulative series of acts taken together amount to a breach of the implied term?”
44. The Tribunal has considered the **Omilaju** case, specifically the paragraphs considering the question of what is the necessary quality of a final straw. The Tribunal notes Dyson LJ’s statement that: “A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term...The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’.”
45. Dyson LJ continues: “If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead he soldiers on and affirms the contract. He cannot

subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely or mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

46. The employer's repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.
47. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for the resignation: it is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**.
48. Further, the Court of Appeal in **United First Partners Research and Carreras [2018] EWCA Civ 213** stated that: "Where an employee has mixed reasons for resigning, the resignation will constitute a constructive dismissal if the repudiatory breach relied upon was at least a substantial part of those reasons.
49. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be regarded as having elected to affirm the contract and the right to accept the employer's breach would be lost." (**W E Cox Toner International v Crook [1981] ICR 823**).
50. If there was a breach of the implied term of trust and confidence that is, in effect, always a repudiatory breach and so would allow the claimant to resign and claim constructive dismissal.

## Conclusions

51. The claimant was not entitled to terminate his contract of employment and treat himself as being constructively dismissed by reason of a breach of the implied term of trust and confidence. I have found that the respondent's conduct in respect of the allegations being put to the claimant, his suspension, and the process followed thereafter was not such as to be likely to destroy or seriously damage the relationship of trust and confidence and did not amount to a fundamental breach of the implied term. There was no evidence before me to suggest that the disciplinary process, from the claimant's suspension up until his resignation, was unreasonable or improper, or that there was, by the respondent's conduct, any breach of the implied term of trust and confidence.
52. There was no breach of the claimant's contract of employment, whether the allegations made by the claimant were viewed individually or cumulatively.

53. Although the claimant may have formed a belief that he would be dismissed, he interpreted the respondent's actions and words to confirm his own conclusion. That conclusion was not justified from the facts of the case. There was no evidence to suggest that the outcome of that hearing was pre-determined, as alleged or at all. The correspondence to the claimant inviting him to a disciplinary hearing set out spectrum of possible sanctions which included dismissal, and the disciplinary hearing was due to be heard by an independent manager.
54. As regards the claimant's allegation that he should not have been suspended as another manager who was accused of bullying was not suspended, I am satisfied that the circumstances of the two cases were different. The allegation against the claimant involved a number of employees who reported to him, whereas the allegation in the other matter referred to involved an ongoing situation between two employees. There was therefore no inconsistency in the respondent suspending the claimant and there was good reason to suspend on the basis that it facilitated the investigation not to have the claimant working with those who had complained about him whilst the investigation was ongoing.
55. As regards the alleged lack of support for the claimant given his mental health, I find that the respondent did offer the claimant the opportunity to attend an occupational health appointment prior to the disciplinary hearing, but the claimant declined that opportunity. The respondent acted reasonably by taking reasonable steps to ascertain whether or not there was any medical condition or matter which should be taken into account. It could not force the claimant to go to OH and was not in breach of contract by continuing with the process having made that offer which the claimant declined.
56. Although the claimant said that the respondent's lack of support in the role was a further contributing factor to his decision to resign from his employment with the respondent, he also acknowledged that the allegations against him were worthy of investigation.
57. The claimant alleges there was some shouting in the investigation hearing. There is some evidence that it may have got a little heated during the investigation meeting at one stage, in the sense that voices were raised, but that episode was short lived and there is no evidence from the minutes that it interfered with the process as a whole or prevented the matter being properly investigated.
58. Although, during the investigation hearing, Mr Hewitt did question the claimant's credibility, he was entitled to do so. It is understandable that the claimant would find that difficult, as somebody for whom honesty is so important, but it was Mr Hewitt's job to evaluate the evidence. Further, it was established during evidence that there was a misunderstanding about the terminology being used which led to some confusion and a lack of understanding of what was being said.
59. Although the claimant did not believe the investigation was balanced, in that other members of the team who he asked to be interviewed were not



interviewed by the investigation manager, this did not amount to a breach of the implied term of trust and confidence, nor could it contribute to such a breach. The disciplinary process was not yet complete, and the disciplining officer may have decided to interview those additional witnesses. In these circumstances, it was investigating allegations raised by a number of individuals, all of whom were spoken to. It was not a breach of contract not to seek a counter view at investigation stage.

60. Despite any concerns which were raised during the Tribunal hearing, at the end of the investigation hearing, the claimant expressed the view that investigation had been conducted thoroughly, and confirmed in his oral evidence before the Tribunal that investigation hearing was thorough and professional.
61. The claimant also relied on his conversation with Mrs Edmundson when they had lunch together prior to the disciplinary hearing, and his belief that that conversation confirmed that the decision to dismiss him was a *fait accompli*. As stated above, although the claimant had formed the view, from the conversation with Mrs Edmundson, that a decision had already been made to dismiss him, but there was no evidence that that was the case, or indeed that that was Mrs Edmundson's view.
62. Although the claimant believed that the respondent had reached the conclusion that he was guilty of serious misdemeanours and that he would be dismissed, there was nothing on which to base those concerns. He was given a fair opportunity to answer the allegations put to him and there was a will to continue with a fair process.
63. Ultimately, the claimant said, in evidence, that he understood that the allegations against him needed to be investigated, and could give no reason why he had an opinion that he would be dismissed and that the disciplinary hearing wouldn't be fair. However, the claimant also referred to his mental health at the time and said that he wasn't, at that time, in a good state of mind, and that he wasn't prepared to put himself through the disciplinary hearing.
64. I now turn to the alleged final straw, which the claimant says was the fact that he was sent a document the day before the disciplinary hearing "regarding clause 19 Confidentiality- any breach of the above will result in summary dismissal for gross misconduct."
65. I understand why the claimant may have been perturbed by receiving that document. It was sent in isolation and out of context and the claimant was not only very apprehension about the disciplinary proceedings, but had formed a view that the outcome was pre-determined. He therefore interpreted this communication as evidence that the decision had been made. However, there was good reason for the respondent to send it to the claimant as it was missing from the pack of documents and was relevant.
66. I therefore find that sending the confidentiality clause to the claimant the day before the disciplinary hearing does not have the necessary quality of a final

straw as it was an innocuous act. In any event it was not sent by the decision maker and could not therefore be any indication that the respondent's mind was made up.

67. Finally, I do not find that the claimant, in any event, resigned in response to an alleged breach of the implied term of trust and confidence. The reason the claimant resigned was that he really could not face the disciplinary proceedings, was not mentally strong enough to proceed and did not want to be dismissed as he would have difficulty trying to obtain further employment. Although it is understandable that the claimant would find it difficult to face the allegations being put to him, and that he might have felt that his position was hopeless, the cause of the resignation was not the respondent's conduct.
68. As to the wrongful dismissal claim, as there was no fundamental breach of contract which entitled the claimant to resign, it follows that he is not entitled to any notice pay.
69. As regards the claim for the bonus payment, it is not possible to conclude that the claimant is entitled to the bonus payment because there is simply no evidence before me to suggest that he is so entitled. Further Mrs Edmundson was clear that, in any event, he was not so entitled.

Employment Judge Rice-Birchall

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Date 12 November 2019

REASONS SENT TO THE PARTIES ON

15 November 2019

FOR THE TRIBUNAL OFFICE

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