



EMPLOYMENT TRIBUNALS

Claimant: Mr S Chadwick

Respondent: Sainsbury's Supermarkets Limited

Heard at: Manchester

On: 28 -31 October 2019
1 and 4 November 2019

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: Litigant in person

Respondent: Mr N Roberts, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair constructive dismissal is dismissed.

REASONS

Introduction

1. The claimant's case comes before the Tribunal on remission from the Employment Appeal Tribunal following an earlier hearing in October 2016 and a reconsideration hearing in 2017.

2. The claimant was continuously employed by the respondent from 3 April 1989 until his resignation on 19 December 2015. The claimant started to work for the respondent in 1987 when he was a student and later joined the respondent on its Trainee Manager Scheme. The last role held by the respondent was as Dried Goods Manager at Leigh, Lancashire, from around September 2014.

3. The respondent is a large retailer.

4. Following his resignation, the claimant brought a claim of unfair constructive dismissal. The claim was received on 19 April 2016 and it followed early conciliation.

The Evidence

5. The claimant gave evidence on his own behalf. The respondent called Alex McKendry, the Deputy Store Manager; Julia Blackett, the Store Manager; Steve Lamb, another Store Manager who dealt with the claimant's fair treatment complaint; and Neil Chason, a Regional Operations Manager who dealt with the claimant's appeal against the outcome of the fair treatment complaint.

6. There was a main bundle of documents with around 540 pages and a claimant's supplementary bundle with approximately 700 pages.

The Issues

7. The List of Issues agreed between the parties is as follows:

- (1) Did the respondent do the following:
 - (a) Not allocating the claimant's department sufficient colleague hours in order to complete all elements of the workload assigned to him;
 - (b) Alex McKendry impeding the claimant's performance in respect of the wine event starting in Black Friday week 2015;
 - (c) Alex McKendry instructing the claimant to forge "safe and legal" paperwork;
 - (d) Holding an unjustified meeting with the claimant on 6 November 2015;
 - (e) Alex McKendry threatening the claimant;
 - (f) Alex McKendry bullying the claimant;
 - (g) Alex McKendry's conversation with the claimant on 19 December 2019 (last straw)?
- (2) If so, did such conduct constitute a fundamental breach of the implied term of trust and confidence?
- (3) If so, did the claimant resign because of it?
- (4) If so, did the claimant affirm his contract prior to resignation?
- (5) If not, did the respondent have a potentially fair reason for dismissal?
- (6) If so, was the dismissal fair in all the circumstances?

Employment Rights Act 1996

8. Section 95 deals with circumstances in which an employee is dismissed and provides that:

- (1) For the purposes of this part an employee is dismissed by his employer 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.

Findings of Fact

9. The claimant's contract of employment was last issued in 2014 when he worked at a different store in the Manchester region. Apart from the place of employment the other terms did not change when he moved to Leigh. Normal working hours were stated to be 39 hours a week. As to flexibility:

“In order to provide great service to our customers you will be required to work any shift pattern according to the needs of the business, which will be agreed with your line manager. This shift pattern will include late nights, nightshifts, three in four Saturdays, one in four Sundays and Bank Holidays.”

10. At the respondent's Leigh store Julia Blackett was the General Store Manager. Alex McKendry was the Deputy Store Manager and under their management there were nine Department Managers, including the claimant who was the manager in the Dry Goods Department. The Department Managers had team leaders reporting to them.

11. The store opened from 07:00 to 22:00 from Monday to Saturday and on Sunday from 10:00 until 16:00. A day shift could run between 07:00 and 22:00. A twilight shift could run from 16:00, 17:00 or 20:00 until midnight and the late-night team would work from 21:00 or 22:00 until 07:00.

12. The store was a “Juniper” store. Juniper was the name of the project designed to remove a full nightshift from stores, replacing them with a smaller team with fewer members. The decision to make the store into a Juniper store was made before Mr McKendry joined the business.

13. When the claimant arrived at the Leigh store there was a nightshift dealing with warehouse duties and overnight replenishment. According to his statement, the reason for his appointment to the Leigh store was to launch Juniper, a structural change in which the overnight replenishment operation was to be removed and replaced with a twilight operation for ambient replenishment and an early bird shift for fresh food replacement. The shifts were from 20:00 until midnight and 5:00 until 9:00. There was also a late-night team. The claimant was asked to oversee the overnight operation and at the end of the financial year there was a significant saving on the labour budget because of the savings in the removal of the Nightshift Manager and reduced nightshift premiums. The nightshift team at some stage asked

the claimant if they could start on the fresh foods delivery as the early bird shift was struggling and they had the time to help out.

14. In December 2014 the claimant was told that in 2015 180 hours would be taken off his department's allocation of colleague hours to pay for the nightshift. He strongly objected and suggested that hours to pay for the nightshift were taken off fresh and produce departments as this was what the nightshift were mainly dealing with. This request was refused.

15. Thereafter there were changes in the store's management where members of the Management Team left to take on other roles within the business at other branches.

16. The claimant, in his witness statement, wrote that he "had managed to make the Juniper operation work, and in fact, was the only department manager in a Juniper store able to do so. However, many aspects of my job role had suffered as a result. I was able to get most processes up-to-date by the time Alex McKendry arrived in June 2015".

17. The claimant had four team leaders reporting to him. He accepted in cross examination that he had never put a business case to Mr McKendry requesting more hours for his team, although the claimant says he was never asked to do this.

18. Julia Blackett said that Alex McKendry was her "custodian of labour" with his aims being to ensure that the work that needed to be done was achieved and that "the bottom line came in". In her view the number of colleague hours allocated to the claimant's department was correct. He was not short of hours and he achieved what he needed to achieve. According to her the claimant chose to use some of his own scheduled management hours to supplement the work of his colleagues rather than to carry out his management duties. The claimant, she felt, should have delegated more tasks to his team leaders and concentrated more on his own management responsibilities.

19. In his evidence, although the claimant states that he was severely short of hours he does not state which elements of the workload assigned to his department he was unable to complete.

20. The respondent from time to time holds a wine event, referred to by the claimant as a "wine stunt", which involves selling six bottles for the price of four. In 2015 there was a wine stunt from Wednesday 25 November for two weeks. Black Friday was 27 November. There was also at the same time a clothing sale.

21. The Leigh store was ranked 7th out of 21 stores in the region for its performance in a previous wine stunt. The store's General Manager was happy with this result but the claimant was very passionate about the wine stunt and wanted the store to become the number one store in the region. The claimant was responsible for the sale of beers, wines and spirits notwithstanding that he was the Dry Goods Manager.

22. The claimant became aware, probably in October 2015, at a Regional Dry Goods Christmas meeting, that there was a strong possibility of a wine stunt starting

around 25 November. The Regional Dry Goods Management Team were challenged to improve their performance.

23. The claimant had been frustrated with the previous wine stunt performance where the store was 7th because he felt he could not place the stock in appropriate second locations and was not able to secure additional stock, particularly because they were not an “events store”. He spoke about this to Julia Blackett and she arranged for the store to become an “events store”.

24. The claimant accepts that he broke procedure by placing customer orders with a view to securing extra stock for sale during the promotion.

25. According to the claimant:

“On my return to store (from the Regional meeting) I informed Alex (McKendry) that the wine stunt would, in all probability, be taking place and spoke to him about the importance that the Regional Manager had placed on it. I told him that I would need some extra hours to deliver. I then spoke to my colleagues and asked the appropriate people that I couldn’t schedule them until the stunt had been confirmed but asked them to be available at short notice that week as historically we are not given much advance notice of the stunts. I obtained commitments from MO, JB, MW and possibilities from MW (2) and JM. At no point did Alex ask me for a business case to support my request.

I was on holiday w/c 15 November. The wine stunt was confirmed in my absence. EB was new to my department and relatively inexperienced. She was not asked to provide a business case by Alex. Alex gave her no guidance to place second locations or secure extra stock from the events team to drive availability. On my return after my holiday my team leader, EB, told me that the wine stunt had been confirmed. I then reviewed the plinth advice and chose six lines that I considered to be strong offers and secured a commitment from RT at the events team that I would receive extra stock of those lines. I then spoke to the colleagues who had given me a commitment to work and agreed overtime with them. I then informed Alex of the action I had taken. He told me to cancel the overtime as he couldn’t afford it. I told him that he knew it was coming. He said, ‘you didn’t give me a business case’. When I protested that he hadn’t asked for one he smiled and said, ‘well it’s too late now. You have to cancel the overtime’. I then asked if I could use front of store space to build a wine display. Alex instructed not to do this until after General Merchandise had cleared all of their Black Friday stock. I argued that GM had received a labour investment and would have to replenish more often. I pointed out that I only wanted two boards of space and that GM could use all of the traveller and kiosk space. This was refused. I asked if I could set the boards up for Wednesday’s trade and Thursday’s trade and instruct the overnights to remove them after close of trade on Thursday. This was refused. I had previously discussed Black Friday with JE and agreed to relinquish the Pharmacy plinth to GM to support their stunt and did not think it professional to renege on this agreement so did not consider this to be a viable option. Alex has stated, and Nail Chason is a witness to, my flexibility

and willingness to come in on my days off or holidays if there was a valid reason. Had Alex contacted me to confirm the event and requested a business case I would have happily have come in and given him one. EB was not asked to produce a business case in my absence.

We improved our regional ranking from 7th to 3rd or top third to top 3, however you want to look at it. This was despite of what I considered to be Alex's attempts to personally sabotage my performance in an event I knew the Regional Manager would be closely tracking and I had a personal investment in due to what I considered to be a poor performance in the previous wine stunt. I felt that his bullying had now escalated to not only affecting me personally but also the financial performance of the store."

26. Mr McKendry deals with this matter very briefly in his witness statement, saying:

"...Simon has complained about a wine promotion event. I initially allocated him hours for this event. However, after this we calculated that the store had overspent on hours. I allowed Simon to keep the hours he had already spent but removed the additional hours I had given him. This is a standard management decision. If he wanted further hours he knew that the process was to present a business case explaining why hours were needed. He did not do this, while other colleagues did approach me with business plans."

27. In cross examination the claimant accepted that the decision on hours was one to be made by Mr McKendry. He accepted that it was the view of Julia Blackett that the extra hours that he wanted could not be afforded.

28. In retrospect the claimant did not think it was the right management decision to refuse him assistance with the wine stunt, but he accepted that he was very personally invested in it and he found it upsetting. Indeed, the claimant was still finding this aspect of his claim difficult to deal with in 2019. This was exemplified by his comment that "third isn't first".

29. The allegation that Alex McKendry instructed the claimant to forge paperwork relates to the store's fridges and/or freezers. They are monitored remotely and if in a particular unit the temperature increases to a defined number a text is sent to the store to be actioned by the Trading Manager. The Trading Manager might be any one of the Management Team allocated to that task on a particular day. If the alarm was responded to within 30 minutes and there were no other issues then it would appear that no further paperwork was needed. If the alarm was not responded to in 30 minutes then paperwork was needed setting out what had happened. The claimant was the store's "champion" in respect of this matter.

30. The allegation does not appear in the claimant's resignation letter or his initial grievance. The first time it appeared was in a document prepared by the claimant called a "rebuttal statement" (provided to the respondent on 31 March 2016) which followed the outcome of his fair treatment complaint. It was a lengthy document setting matters out over 26 pages with the relevant paragraph, in the middle of a section dealing with the retail temperature management system:

“I concluded that Alex was not dealing with members of management effectively or at all. At one point Alex instructed me to review the RTMS file and ensure that the file would be found to be in order if we had an audit. I advised him that I thought that was a breach of procedure and potentially illegal. I informed him that if he wanted this doing he should use the information I had provided to identify the members of management who had missed alarms to forge their own paperwork. Alex was not happy with this. I felt bullied by an implied threat of recrimination. I told him that I wasn't comfortable completing temperature management control retrospectively and that whilst I would do it on this occasion it was his responsibility to deal with members of management who were missing alarms. I told him that if he wanted paperwork backdated and forged after the event to give the impression that missed alarms had been dealt with then he should ask the person who missed the alarm to forge the paperwork as I would not, under any circumstances, be doing so again. Alex wasn't happy with this either but said he would make sure it wouldn't happen again.”

31. The paper records completed by the claimant were said not to be available to the Tribunal as according to the respondent they were only kept for a short time and destroyed by the time the claimant raised his complaint in March 2016.

32. The claimant in cross examination accepted that he did not have raise the issue of being told to falsify records in his meeting with Alex McKendry on 6 November 2016 in the presence of Charlotte Singleton, the Café Manager, as a notetaker. He also accepted that it was not in his first grievance.

33. He accepted that it was a reasonable management instruction, by itself, for Alex McKendry to instruct him to review the file. As to the exact words used, the claimant does not remember but it was to the effect that he should go and fill in the paperwork so if it was audited it was all there.

34. The claimant's contention is that the paperwork should have been filled in by the responsible manager immediately following the event.

35. Alex McKendry deals with this issue in his witness statement, saying that:

“In relation to the audit, I have seen that Simon has suggested that I asked him to backdate or ‘forge’ documentation. This is completely false. I would never ask anyone to do this.”

36. The claimant does not give a date for this allegation. He did, however, accept that in a coaching session with Alex McKendry on 20 October 2015 there was a note as to the claimant improving file maintenance and to talk about the performance of store managers at Monday's meetings. It was noted that it was his sponsor area so he needed to police it and he was the safety net if something was missed. The claimant said he did not need training or support. He did not want to name and shame managers who missed the alarms at the Monday management meeting, and he said he would go to see Mr McKendry on a one-to-one basis, after which Mr McKendry would speak to the managers.

37. On 5 November 2015 the Leigh store was audited internally and the overall risk rating was amber with a compliance rating of 95%. The issue that seems to have caused the problem related to temperature control. The auditor issued a report which mentioned alarms not being acknowledged or properly dealt with. In some cases it was found that there was no evidence of any action being taken following the alarms.

38. Oral feedback was given on the day of the audit to Julia Blackett, Alex McKendry, the claimant and one other.

39. According to Mr McKendry he met with the claimant as a result of the amber rating. He did this because the RTMS system fell within the claimant's sponsored area. It was nothing personal. He would have asked to see any other manager if the issue had fallen within their sponsor area.

40. A letter dated 5 November 2015, signed by Alex McKendry, was sent to the claimant:

"I am writing to ask you to attend a meeting on Friday 6 November 2015 at 3.00pm. The meeting will take place in the manager's office in store. The meeting is to investigate your alleged conduct; namely:

- On 5 November 2015 the store received an amber safe and legal audit. This was due to the RTMS process not being followed correctly in store. This is your sponsor area and your responsibility to ensure this is followed.

Please be aware this is not a formal disciplinary meeting.

The meeting will be conducted by myself with a notetaker. You may be accompanied...

Should you have any queries then please do not hesitate in contacting me."

41. Alex McKendry was accompanied at the meeting by Charlotte Singleton, the Café Manager, as notetaker. Ms Singleton was at the same level as the claimant and some of the café fridges were involved in the issue causing the failure of the audit. Upon reflection Mr McKendry accepted that it may have been uncomfortable for the claimant to have been questioned by Mr McKendry in the presence of Charlotte Singleton.

42. The meeting notes show that the claimant accepted that file management was his sponsor area and he was ok to continue with the discussion without a colleague. In the meeting the claimant accepted that he had not spent enough time on file management. There was a dispute as to whether or not the claimant should have named and shamed defaulting managers in the Monday meeting, but the claimant said he would thereafter report directly to Mr McKendry.

43. After a quarter of an hour's adjournment there was some talk about corrective action being taken for the future. The claimant accepted as fair comment that he had "taken his foot off the gas" in relation to this matter.

44. Mr McKendry concluded that no further action would be taken but the claimant was to ensure that he delivered on the steps they had discussed. The claimant concluded by saying he was sorry and he wished to move on.

45. There was no mention of an allegation of falsifying records in the notes of the meeting.

46. As to Alex McKendry threatening the claimant, the claimant refers to a comment he made at an afternoon huddle meeting at which he, Julia Blackett, Alex McKendry and others were present. It was to the effect that he was still waiting for Mr McKendry to buy him a pizza, he having bought a pizza for Mr McKendry on one occasion when they worked together on the night shift. According to the claimant after the meeting:

“Alex followed me into the warehouse. He said, ‘who do you think you are, trying to show me up in front of the managers like that?’ I said, ‘Calm down. I didn’t mean to upset you, sorry. I was only joking’. He said, ‘Sorry? You will be’. He then walked away. He did not swear or raise his voice but there was an implied threat of recrimination.”

47. This matter does not appear to have been put to Mr McKendry by the claimant. It does not appear in his witness statement.

48. As to bullying, the claimant believes that Alex McKendry went out of his way to make the claimant’s life difficult with the way in which he would not agree with suggestions the claimant made for changes in the way in which things worked. He would pick on the claimant in connection with tidiness in the warehouse. The claimant believed that his hours were unfavourable when compared with those of his colleagues in relation to weekend and late-night working.

49. In his resignation letter the claimant complains that he was often given more late nights than any other manager. Mr McKendry was not cross examined about this. From the rosters available it appears that the claimant did more late nights than early mornings but there was a considerable variation amongst other members of the management team. There was one other manager with a higher ratio of late shifts to early shifts than the claimant.

50. The claimant accepted that he was generally content to do night shifts and that if a colleague on a night shift wished to find someone to exchange it with then the claimant would normally be the first person to go to.

51. The events leading up to Alex McKendry’s conversation with the claimant on 19 December 2015 relate to Colleague Progress Reviews. The claimant provided a self-teach support guide for line managers (retail) in respect of colleague progress reviews. Progress should normally be reviewed every six months and each review should last around 45 minutes. The meeting was for the giving of feedback and the setting of smart targets. Review forms were to be completed and at the end of the process colleagues would be rated as “underperforming”, “opportunities to improve”, “succeeding” and “exceeding”. There was the appropriate supporting paperwork.

52. In October 2015 Julia Blackett became aware that for her store there was an issue with CPRs. The claimant had 29 outstanding CPRs from a team of 30-40 colleagues. In the Monday meeting at the beginning of December 2015 she spoke to the management team, including the claimant, reiterating the importance of completing all of the outstanding CPRs. She challenged them by saying that they had two weeks until the pre-Christmas rush and that they needed to use this time to complete the outstanding CPRs. She did not want them hanging over their heads after Christmas. It was important for the process to be completed by everyone at the same time, so no-one felt singled out. To assist her management team in completing the documents before Christmas she informed them that she and Alex McKendry would trade the shop by taking over the tasks of the departmental managers on the shop floor during their shifts to allow them to meet with colleagues and complete outstanding CPRs on shift.

53. After a week or so Ms Blackett was told that the claimant had done six out of 29 CPRs. She told the claimant that the process did not take a long time to complete and for shift workers it should only take 10-15 minutes each and he needed to get the process completed as instructed.

54. By 18 December 2015 Ms Blackett had a meeting with Alex McKendry and an HR team member who was reporting to the Regional Office on CPR completions. The claimant still had more than 20 CPRs outstanding.

55. They went on to discuss how to approach the claimant's failure to complete the outstanding CPRs. Alex McKendry and HR thought it best to leave dealing with it until after Christmas but Ms Blackett disagreed, feeling it had to be addressed urgently. In her view the claimant knew that completing the process was important and he had not done it. He had clearly not acted upon her instructions and she felt let down by him. He was letting the rest of the store and the team down also by his inaction, and so she told Alex McKendry he had to let the claimant know that his lack of action was not acceptable. She was the person who instructed Alex McKendry to talk to the claimant about his failure to complete the outstanding CPRs on 19 December 2015.

56. According to Alex McKendry his preference was to speak to the claimant about the outstanding CPRs after Christmas because it was a busy period and he felt the claimant would not react well, but it was the view of Julia Blackett that it should be dealt with before Christmas. Alex McKendry phoned the claimant and asked him to come up to see him. The claimant did not want to leave the shop floor because he was putting stock out. Mr McKendry said that he did need to speak to the claimant face to face. Mr McKendry produced some handwritten notes of the meeting.

57. The handwritten note is dated Saturday 19 December:

"5.30pm – Asked Simon to come up into the office:

- Spoke to Simon about CPRs and still have 23 outstanding.
- He said 'I know' and 'I've moved them on'.

- I said that 'since October 20th you have been behind' and that this is not acceptable.
- I feel that you are not doing what you should around completing these and I will need to move this to a disciplinary meeting after all the notes and conversations we have had.
- Simon told me to 'stick my job, it's a lot of shit!!'.
- I said there is no need for this and he stormed out of the office, said I could fuck off."

58. According to the claimant:

"On December 19th, Alex called me to the manager's office and told me he was going to take disciplinary action against me for not completing my outstanding CPRs. I had previously asked for the Fresh Foods Department to be made accountable for their own clearance. This was refused. I had previously asked for overtime to be brought in so I could complete them. This was refused. By this time my health had started to suffer. I was not able to sleep properly, I was stressed and was suffering from depression. I became very angry and told Alex I was leaving the business. It was clear that he had timed this so he could discipline me again the following week and the week after that as no progress would be made. I was so angry I wanted to physically attack him and that is completely against my nature. I'm normally a quiet calm, pleasant person, who enjoys working with the people around me and try to make it an enjoyable place to be. I had to leave as I couldn't be put in a position where my health was going to suffer or one where I felt obliged to resort to violence."

59. In cross examination the claimant accepted that the request in early December to complete the CPRs before Christmas was not an unreasonable one, and he did not raise any issue when it was made. He agreed that the situation with regard to his failure to complete them was very serious.

60. He accepted that on 20 October he had discussed with Alex McKendry his outstanding CPRs on the basis that they needed to be completed, and that not to complete them was not fair to colleagues. The claimant was advised to set out a clear plan to complete them to reach the point where there were none outstanding, and if the claimant needed to change shifts to accomplish CPRs then he should let Mr McKendry know.

61. He did not feel the management instruction to get the CPRs done was unreasonable. He agreed that a plan was set up to enable him to do them but they were not completed.

62. When Mr McKendry called him, the claimant was stacking Prosecco (wine) and was already in a bad mood.

63. He did not challenge that it was Mr McKendry's idea to speak to him after Christmas rather than before, and that Julia Blackett had told Alex McKendry to discuss it with him on 19 December 2015.

64. According to the claimant, when he went in to Mr McKendry his first words were to the effect that Mr McKendry was going to give the claimant a warning for his outstanding CPRs. The claimant did not accept that it had happened in the way set out above from Mr McKendry's note. Had Mr McKendry spoken in accordance with the note then it was the claimant's view that he would not have exploded in the way that he did.

65. The claimant could not recall what was said. He had lost his temper to a large degree. He did not deny that he had sworn at Mr McKendry. He could not recall exactly what he said. He just recalled the anger.

66. The claimant accepted that he was angry before he went into the meeting and he had a very strong reaction to what was said. He took it there and then as a warning but this may not have been the case.

67. The claimant did not come back to work as expected the following day, and on or about 20 December he typed up his letter of resignation which he took in on 24 December 2015 together with his uniform.

68. Julia Blackett made a manuscript note of what Alex McKendry texted her on Saturday 19 December following his discussion with the claimant. When he did not come in on 20 December Alex McKendry called the claimant, who said he had resigned with immediate effect and did not want to discuss matters. Julia Blackett decided to tell people that the claimant was absent for personal reasons to allow him time to reconsider. She also made a note of her meeting with the claimant on 24 December. The claimant said he knew it was not good timing but he had felt frustrated for months and things had come to a head. It related to hours. With regard to the CPRs, it was not his priority. His priority was the shop. The claimant said he could not work with Alex McKendry. Ms Blackett would be prepared to give him a personal reference if needed. She also said that had the claimant still been working for her then swearing at her deputy and leaving the store was not acceptable behaviour. She noted the claimant saying he did not remember swearing but had told Alex McKendry to "stick his job".

69. The claimant's resignation letter, addressed to Julia Blackett, stated that:

"It is with great regret after 25 years' service I am giving you written confirmation of my resignation with immediate effect on the grounds of constructive dismissal. I gave Alex McKendry a verbal resignation on Saturday 19 December.

This arose from Alex's decision to instigate disciplinary action against me for outstanding CPRs. He chose to take this action despite me making him aware for several months that I did not have enough hours on my department to fulfil my job role. From approximately March to November I have not been able to fill my allocated hours as even with overtime my contracted hours were too low. I was not able to recruit as the store is over contracted. During

this time I was consistently running 50 hours short of my allocation and this often rose to 100.

I believe I have been treated unfairly as despite my shortage of hours the store has overspent on labour due to the mismanagement of hours instore. The WATT should be used to determine how many hours each department should use but several departments are allowed to operate on an allocation well in excess of the WATT's recommendation.

As well as not having enough labour I am also often given more late nights than any other manager. During your listening group a few weeks ago I cited the previous week's schedule when I was LNT Sunday, TTFS Monday, LNT Tuesday, off Wed and Thurs, LNT Friday and on my department Saturday. Whilst this was a particularly bad week it isn't unusual for me to be given more LNT shifts than any other manager. As well as impacting on my work/life balance it also impedes my ability to complete my job role. I'm also given very few early starts in comparison to other managers.

When I spoke to you a few weeks ago about Alex's lack of support we discussed the last 25% wine stunt of the year. Neil's direction had been clear in that he wanted an improvement in our regional standings. I therefore brought in overtime at short notice as I had been on holiday the previous week but Alex told me to cancel it as the store couldn't afford the hours due to the influx of Christmas temps. However, GM and Clothing were allowed to use overtime for their stunts. It goes without saying that this is unfair treatment...

I have always enjoyed my role as a department manager but I am no longer prepared to work under conditions that I feel to be so unfair."

70. The penultimate paragraph of the claimant's resignation letter has been excluded as it contains personal information relating to him and members of his family.

Submissions

71. Mr Roberts provided a skeleton argument set out over 19 pages. The claimant had the opportunity to complete his skeleton argument over the weekend and he produced a written document set out on four pages. The claimant dealt mainly with the facts.

72. At the end of the evidence I made reference to the judgment of the Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833** as an example of a recent case in which the Court of Appeal had dealt with the issue of constructive dismissal involving an alleged breach of the implied term of trust and confidence.

The Relevant Law

73. Section 95(1)(c) has been set out above.

74. The judgment of the Court of Appeal in **Kaur** was given by Lord Justice Underhill with whom Lord Justice Singh agreed.

75. Taken from the IRLR headnote, the Court of Appeal held:

“The Tribunal had not erred in striking out the last straw constructive dismissal claim.

An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation; provided the later act forms part of the series. This does not involve any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the implied term of trust and confidence fall within the well-recognised qualification to that principle, that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter. It is true that the correct analysis in such a case is not that the victim can go back on the affirmation and rely on the earlier repudiation as such: rather, the right to terminate depends on the employer’s post-affirmation conduct. However there is nothing wrong in speaking of *the right to terminate* being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

- (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?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part 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).
- (5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering in the circumstances of a particular case may not be easy...

The test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.”

Conclusions

Were sufficient colleague hours allocated to the claimant's department in order to complete all elements of the workload assigned?

76. Based on the claimant's statement that he had managed to make the Juniper operation work, and his comment that he was the only Department Manager in a Juniper store able to do so, and because the claimant has not provided any evidence of any inability on the part of his team to complete all elements of the assigned workload, I am unable to find that insufficient colleague hours were allocated to the claimant's department in order to complete all elements of the workload assigned.

Did Alex McKendry impede the claimant's performance in respect of the wine stunt?

77. There is no doubt that the claimant took the view that his performance was impeded by Mr McKendry refusing to allow overtime for members of his team and/or for the claimant to display wines in prominent areas within the store. Whether the store's performance would have improved had the claimant been allowed the resources that he wanted must be a matter of conjecture.

Was the claimant instructed to forge paperwork in connection with the temperature management system?

78. The onus is on the claimant to satisfy me on this point, as well as on all of his other contentions. Although the absence of the paperwork from the bundle is a cause for concern I note that the allegation was not made by the claimant in the 6 November meeting. It was not in his resignation letter and only appeared in his subsequent document produced at the end of March 2016. The claimant has accepted that it would have been a reasonable management instruction to make sure the file was in order. Based on the evidence before me I am unable to be satisfied that it is more likely than not that the claimant was told to forge the paperwork.

Was an unjustified meeting held with the claimant on 6 November 2015?

79. I am satisfied that following the failure of the audit on 5 November it was justified to hold a meeting with the claimant on 6 November 2015 as it was his area of responsibility that caused the failure of the audit. The claimant was made aware before the meeting that it was not a disciplinary meeting. It would have been better had the meeting not been held by Mr McKendry with the particular notetaker, but that in my judgment does not mean that the meeting was itself unjustified.

80. As to threatening and bullying, I do not conclude that the behaviour of Mr McKendry went this far. He had a job to do as Deputy Manager and he did it. The claimant seems to have been treated in a similar fashion to other colleagues in relation to hours of work etc.

81. There clearly was a conversation on 19 December. As a matter of fact, I prefer the version provided by Mr McKendry in his note, the contents of which are set

out above. I find that the conversation was held after clear management instructions had been given to the claimant in October and December to complete his CPRs and that he had not made sufficient progress by 19 December, notwithstanding arrangements being made to assist managers to carry out the reviews. On the basis that the claimant was unable to remember what he said to Mr McKendry, and the reference in his resignation letter to the instigation of disciplinary action it seems to me that the claimant's recollection of what Mr McKendry said to him was wrong. I do not find that the claimant was told on 19 December that he was going to be given a warning. I find that the claimant was told that it was necessary to move it to a disciplinary meeting.

Did any of the behaviour of the respondent constitute a fundamental breach of the implied term of trust and confidence?

82. I have not found in favour of the claimant in respect of the issues set out at 7 (1), (a), (c), (d), (e) and (f) in the list of issues.

83. As to (b), impeding the claimant's performance on the wine event, I do not find that the actions of the respondent, through Mr McKendry, constituted a fundamental breach of the implied term of trust and confidence. Mr McKendry was entitled to take the management decision that he did to the effect that he did not wish to allocate further overtime or floorspace to the claimant to assist him with the wine stunt. The wine stunt was not the only promotion ongoing at the relevant time. It is for the store's Manager and Deputy Manager to allocate staffing and space as they think appropriate. This did not amount to a fundamental breach of the implied term of trust and confidence.

84. As to (g), the conversation with the claimant on 19 December, I note from **Kaur** that a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee. To state that it was necessary to move to a disciplinary procedure, in the circumstances where the claimant had failed to follow a reasonable management instruction, was in my judgment a reasonable thing to say. Saying that the matter had to move on to a disciplinary process was not itself a part of the disciplinary process. The claimant resigned before any formal disciplinary process was started.

85. Looking at the **Kaur** questions, the most recent act on the part of the employer which the employee says caused or triggered his resignation was the meeting on 19 December. The claimant has not affirmed the contract since that act because he resigned immediately after it. In my judgment the act was not a repudiatory breach of contract. It was a simple statement to the claimant, who had failed to follow reasonable management instructions, that it would be necessary to move on to a disciplinary process.

86. On the basis of my findings in respect of the various matters alleged, this was not part 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.

87. For these reasons the claimant's claim that he was unfairly dismissed, when he resigned, is dismissed.

Employment Judge Sherratt

18 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 November 2019

FOR THE TRIBUNAL OFFICE

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