



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE NASH (sitting alone)

BETWEEN:

Claimant

MR SCOTT COURTNEY-DEAL

AND

Respondent

APCOA PARKING LIMITED

ON: 1 October 2019

APPEARANCES:

For the Claimant: In Person

For the Respondent: Mr Bernard Watson (Consultant)

Judgment having been sent to the parties on 5 October 2019 and written reasons having been requested on 10 October 2019 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was dismissed on 24 November 2018. Following an ACAS early conciliation period from 26 November to 26 December 2018 he presented his claim to this Tribunal on 7 February 2019.
2. In respect of witnesses, the Tribunal heard from the Claimant on his own behalf.

From the Respondent it heard from Mr Dale Barraclough, an Assistant Contract Manager, and Ms Chelsea Smith, its Human Resources Manager.

3. The Tribunal had sight of an agreed bundle to page 169. Three added pages were included by consent at the hearing.

The Claims

4. The two claims before the Tribunal were :-
 - a. unfair dismissal under section 98 Employment Rights Act 1996; and
 - b. unauthorised deductions from wages under section 13 Employment Rights Act 1996.

Issues

5. With the parties the Tribunal identified the issues as follows.
6. In respect of the unauthorised deduction from wages claim, the sole issue was:
 - a. whether or not the Claimant was contractually entitled to an up-lift in his salary in the second month of his secondment.
7. In respect of unfair dismissal, the issues were:
 - a. whether the Respondent fundamentally breached the Claimant's contract of employment.
 - b. The Claimant relied on the following conduct of the Respondent as a fundamental breach, either singularly or cumulatively:-
 - (i) The Respondent's conduct as set out in the Claimant's grievance letter;
 - (ii) A decision that the Claimant did not perform to required standard for the Operational Support Manager role,
 - (iii) Delay in making a decision over the grievance;
 - (iv) Failure to inform the Claimant what his job was whilst he was absent sick ;
 - (v) Failure to pay the Claimant his uplifted salary; and
 - (vi) The Claimant being re-deployed back to his old role in Maidstone.

- c. Did any such breach(es) cause the Claimant to resign?
- d. The Respondent did not rely on waiver.
- e. The Respondent informed the Tribunal that if the Claimant's succeeded on these issues, it did not argue that the dismissal was unfair and accordingly the Claimant would have been unfairly dismissed.

The Facts

- 8. The Respondent provides parking enforcement services to local authorities. It did not provide any organisation details and the Tribunal accordingly proceeded on the basis that it is a large and well-resourced organisation.
- 9. The Claimant started work on 1 March 2015 as a Civil Enforcement Officer (CEO) at its Maidstone branch. He worked on the street enforcing parking regulations and issuing parking tickets.
- 10. In 2018 the Respondent was looking to appoint more managers. The Claimant was approached about a possible position as an Operational Support Manager (OSM) working at the Respondent's Bromley and Bexley contract. An OSM is a role reporting to the Contract Manager who manages the contract with the local authority. There may be one or more OSMs per contract. The OSM is senior to and assists in the management of senior CEOs, and CEOs. The role involves management of rosters and equipment. An OSM also goes out on the street, carries out appraisals and deals with incidents which arise.
- 11. Following the approach from the Respondent, the Claimant met Ms Wilson, the Contract Manager at Bexley and Bromley. Bromley and Bexley are two separate boroughs managed by the Respondent as a single contract.
- 12. One of Ms Wilson's OSMs had been demoted and she needed someone to replace him. Ms Wilson and the Claimant agreed that he would start work at Bromley on 24 September 2018 as an acting-up OSM for at least two months. Essentially it was a try-out on both sides. However, the Claimant said that Ms Wilson strongly indicated that the position would be made permanent after two months, because there was such a need for staff. The OSM role attracted a higher salary than the Claimant's CEO role.
- 13. The Tribunal saw no reason to doubt the Claimant's account of this. It was plausible, consistent and coherent.

14. Following agreement with Ms Wilson, the Claimant undertook a week's training elsewhere and duly started at Bromley and Bexley on 24 September. The Claimant arrived in the middle of a very busy shift at a very busy office.
15. The Claimant later wrote a grievance on 8 October setting out what he says happened at Bexley and Bromley and his evidence before the Tribunal was consistent with this. When it was put to the Claimant that the office was simply not set out to have him, he agreed. He had nothing resembling an induction. Ms Wilson was not there when he arrived. He said that it was highly disorganised. He said that, in the absence of any information or instruction as to how the office operated and what his duties might be, he ended up asking colleagues what they were doing. The colleagues were too busy to answer his questions, so he simply watched them hoping to learn.
16. The staff at Bromley did not want the Claimant coming in as a new OSM because they had a favoured internal candidate, in effect, the previously demoted OSM. They told the Claimant that this demoted OSM was going to be getting the role back.
17. The Claimant was isolated. He was not given any opportunity to do his role at Bromley. His manager, Ms Wilson, was either not there or, in effect, ignored him. He had no access to the computer. He could not go out on the street to act as a CEO, because the borough had not provided permission.
18. After about two days he was sent to the Bexley office, where he successfully shadowed the OSM there and was given access to the computer.
19. By this time the Claimant had concerns about how the Bexley and Bromley branch was operating and he made notes which were before the Tribunal. He was concerned, for instance, that rotas were set up often only one day in advance - leading to a very high level of absenteeism. He asked for a discussion with Ms Wilson and, after delays, obtained such a meeting. He listed his concerns about the branch and Ms Wilson replied that Bromley was not like his previous branch, which was much smaller.
20. The Claimant concluded that that the - supposedly - demoted OSM was, in fact, carrying out the OSM for which he, the Claimant, had been recruited. This was why he was not getting access to any work at Bromley. Ms Wilson then told the Claimant, for the first time, that the role for which he was trying out, was not necessarily an OSM role but might be a senior CSO.

21. The Claimant returned to the Bromley branch on 1 October 2018. He was the only OSM on site because another OSM had gone on maternity leave and the other OSM was away on training. This left the Claimant and a senior CEO to manage the office and staff. He found he, again, had no computer access. The Claimant did what he could in respect of paperwork.
22. The Claimant's permission to work on the street then came through from the local authority. He was used he says, in effect, as cover as a CEO on the streets. The Claimant says that he was encouraged to come in on his off day and, keen to make a good impression, he agreed. However, he was sent out in unsafe conditions when he was expected to stay out until 10.00pm at night in an area he did not know without a radio.
23. The Respondent's policy is that CEOs should refuse to work without radios. However, the Claimant felt that he had to no choice in practice when he had to make a good impression, and he had agreed to come in on his day off. When he raised the issue, he was told essentially that this is the way it worked.
24. When he subsequently raised this with Ms Wilson, she criticised him for going out without a radio.
25. The Claimant, he says, was also given difficult and anti-social shifts with insufficient time for sleep and travel between. Further, he was not told where he was supposed to go and there was no clear rota, so he was unclear as to where he was supposed to be and when.
26. Matters came to a head when Ms Wilson told the Claimant that she did not view him as suitable for the OSM role because he was not proactive enough. The Claimant found this implausible.
27. On 5 October 2018 the Claimant overslept due to having a panic attack. Although he was due in at 6.30am, he was not chased until 11.00am. He phoned Ms Wilson saying that he was asking for support. Ms Wilson, at this point, said that she was not responsible for his payroll. The Claimant then emailed her saying that he felt that it was an impossible situation and he was signing off work sick due to stress.
28. The Claimant was signed off sick till 3 November 2018. He raised a detailed grievance about his treatment as an acting-up OSM by post on 8 October 2018.

The grievance stated in terms that it was primarily against his manager, Ms Wilson.

29. This was received on or around 10 October. According to the Respondent's grievance procedure, the Respondent aims to conclude grievances within twenty days.
30. Mr Barraclough was appointed as Grievance Officer. The Respondent stated that it characterised the grievance as being predominantly against the Claimant's colleagues at Bexley and Bromley rather than against the manager.
31. The Claimant was concerned that Mr Barraclough was junior to Ms Wilson and thus unsuitable to deal with his grievance against her. However, despite being offered an alternative manager, he agreed to Mr Barraclough.
32. Mr Barraclough and the Claimant had a four-hour meeting to discuss the grievance on 1 November 2018. The Claimant found Mr Barraclough polite, professional and empathetic. Mr Barraclough suggested mediation.
33. On 2 November the Claimant said that he would consider mediation over the weekend. He asked why he had not been paid his agreed higher wages for his work at Bexley and Bromley. The same day he also emailed his previous manager at Maidstone asking who was, in fact, responsible for his wages.
34. On 5 November the Claimant emailed the Respondent saying that he would try to mediate, he wanted to try-out as an OSM, but he did not want to go back to Bromley. He said that he was "in limbo" and he did not know what his job was. He was signed off sick again.
35. Mr Barraclough suggested that the Claimant come to a mediation meeting at Bromley. The Claimant replied that he would prefer to wait until the grievance had been decided before mediation. The Claimant told the Tribunal that he was concerned that he might have, in effect, burnt his bridges at Bromley by bringing a grievance; therefore, he wanted the subject matter of his grievance dealt with first.
36. On 8 November Mr Barraclough emailed the Claimant asking him if he was returning to Bromley. The Claimant replied he had had no communication from the Respondent and did not know.

37. Mr Barraclough was then replaced as Grievance Officer by another manager, Mr Telling. The reason was, the Respondent now accepted, that the grievance related more to the Claimant's manager than his colleagues. Accordingly, a more senior grievance officer was required.
38. The Claimant believed, wrongly as it turned out, that the new Grievance Officer was of a lower grade than Ms Wilson. On 16 November 2018 the Claimant emailed the Respondent chasing up the grievance. He stated that he would give the Respondent until 23 November to resolve or come up with a decision on his grievance and then he would have to 'seriously consider his options'. He again said that he was in limbo and he did not know where his job was.
39. The new Grievance Officer emailed the Claimant that day telling him that he should go back to Maidstone in his original role on 19 November, because his secondment with Bromley had come to an end. He would arrange to meet the Claimant the next week to go through the grievance in more detail.
40. The Claimant emailed back asking for confirmation of his job at Maidstone. He explained that he was off sick and said that, presumably the Respondent would bring the grievance to an end before he was due back from sick leave on 24 November.
41. The Claimant resigned by way of an email on 24 November 2018. The reasons given for his resignation in this email were that he had lost trust and confidence in the Respondent, that he would end up in his previous role, and that the grievance would be possibly permanently delayed. He believed that he had already provided sufficient detail for the Respondent to deal with his grievance. The grievance was put in on 8 October by 24 November the Respondent had provided little in the way of response.
42. The Claimant applied to the Tribunal. He was dissatisfied with the Respondent's disclosure and made a subject access request under data protection legislation sent to the Respondent's representatives.
43. The Respondent's witnesses stated that they were entirely unaware of this request, although the Respondent has a dedicated data protection department. No explanation was provided as to why the subject access request was not complied with.

The Applicable Law

44. The applicable law is found in the Employment Rights Act 1996 as follows

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

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)—

...

(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.

Submissions

45. Both parties made brief oral submissions.

Applying the Law to the Facts

46. The first issue was whether the Respondent had fundamentally breached the Claimant's contract of employment.
47. The Tribunal considered the elements of the fundamental breach relied upon. Firstly, the events set out in the Claimant's grievance.
48. There was little evidence before the Tribunal to contradict the Claimant's account of what happened at Bexley and Bromley. The Tribunal had sight of a contemporaneous email from Ms Wilson to the Respondent saying that the Claimant was not suitable on 3 October 2018. However, this email was very brief and contained no details.
49. Further, there was a paragraph in Ms Smith's statement to the effect that Ms Wilson had informally told her that the Claimant had tried to change operating procedures outside of his role, consistently made demands, was disruptive, had upset colleagues, made notes, was very critical and had poor time-keeping. However, there were no contemporaneous notes - or any other evidence - of this conversation(s). Accordingly, the Tribunal could not judge how reliable Ms Smith's recollection might be.
50. The Claimant's account in his grievance was put together very shortly after the events to which it referred. It was detailed, it was coherent and, as far as it went, entirely plausible. He put it together at a time when he knew that Ms Wilson, who was senior to him, would be in a position to dispute it.
51. The Tribunal had no other witness to these events to dispute the Claimant's account. The other account was hearsay and there were no contemporaneous documents, beyond an assertion in an email. In these circumstances, the Tribunal accepted the Claimant's account on the balance of probabilities.
52. The Claimant was put under pressure to go out without a radio. He had come in on a day off and been told that he needed to make it work. As the Respondent submitted, he should have resisted this instruction. However, the Tribunal accepted that he was in a weak position – he was newly arrived at Bexley and

Bromley and trying out for a promotion. The Respondent should not pressurise its staff into going out on the street late at night in unfamiliar areas without radios. Such an employee is placed in a potentially dangerous position. The risk is clear.

53. Whilst the Claimant overslept for work, this was as a result of his shifts being arranged in a haphazard manner resulting in his having too little sleep.
54. The second putative breach was the decision that the Claimant did not perform to the required standard for the OSM and would not be confirmed in post. The Tribunal found that this was an unjustified decision based on the fact that it had accepted the Claimant's account of his time at Bexley and Bromley. The Tribunal could not understand how the Claimant could legitimately be accused of a failure to be proactive.
55. The third putative fundamental breach was the delay in making a decision about the grievance. The Tribunal found it hard to understand why a more senior manager than Ms Wilson had not been appointed from the outset. The grievance stated in terms that it was against the Contract Manager. Therefore, it was highly likely that failing to appoint a more senior manager would cause delay, irrespective of Mr Barraclough's experience and personal qualities. There was little in the Claimants' detailed and lengthy grievance to suggest that it might be easily resolved informally. The Respondent later realised that it did, after all, need a senior manager and found one reasonably promptly.
56. Some of the delay was caused by the Claimant being off sick. The Tribunal recognised that the Respondent was in a somewhat difficult position. It did not want to pressurise an employee who was signed off sick with stress. However, this stress was linked to the subject matter of the grievance and was unlikely to be resolved until the grievance was.
57. Although the Claimant expected the grievance to be dealt with in twenty days, this was an aim not a promise in the Respondent's grievance procedure.
58. The grievance went in on 9 or 10 October. In effect, a new manager on 12 November, a month later, started again from scratch. The Claimant's position was that he wanted his grievance resolved before he came back from sick. He was told it would be looked at after he had come back from sick.

59. The Tribunal next considered the failure to tell the Claimant what his job was whilst he was on sick. The Claimant's position was unclear for some time. He was told he was trying out as an OSM and then told that he was trying out possibly as a Senior CEO.
60. The Respondent's case was that the Claimant should have realised that the Bexley and Bromley secondment was not working out and, accordingly, his position was not unclear. However, this does not explain why the Respondent did not tell him so at the time. The Claimant raised this with the Respondent, but it was not effectively dealt with. Mr Barraclough, for instance, asked him if he had heard anything from Bromley, which was not consistent with the secondment having come to an end. The Tribunal does not criticise Mr Barraclough for this. It is likely that he simply reflected the Respondent's confusion. The Claimant said that he did not want to go back to Bromley, but it was unclear if this was actioned and the Tribunal accepted the Claimant was to some extent "left in limbo".
61. Therefore, when the Claimant was off sick with stress, he did not know what his job was. This was unlikely to be conducive to his recovery and getting him back to work.
62. The situation was not helped by the failure to put anything effective in writing about the secondment from the beginning. In the view of the Tribunal, some of the problems might have been avoided, or at least mitigated, had the secondment been the subject of more than a couple of very brief emails.
63. The Claimant's confusion as to his role was exacerbated by confusion over his salary. There was an arrangement, which the Respondent accepted, for a two-month trial at a higher salary. The Respondent then failed to pay his increased salary. In effect the Claimant was demoted during his two-month try-out without being told at the time. He only discovered this via his payslip. He had told the Respondent that he did not want to go back to Bexley and Bromley, but the Respondent had not agreed this. Whilst absent sick, the Claimant was entitled to be paid with reference to his current role. He was not told the secondment was formally over until the email of 16 November.
64. According to documents in the bundle, the Maidstone branch told Bromley on 3 October that Bromley was now taking over responsibility for the Claimant's

salary. The Claimant was aware of this by 5 October. Both Maidstone and Bromley accordingly denied that they were responsible for the Claimant's salary. He asked the Respondent on 5 November why he had not been paid the increased salary.

65. The Claimant was then deployed to Maidstone on his old role and salary.
66. The issue for the Tribunal was whether singularly or cumulatively, all or any of this amounted to a fundamental breach.
67. The Tribunal accepted that the Claimant had been treated badly at Bexley and Bromley. The Tribunal on the balance of probabilities came to the conclusion that there was no intention of taking him on as an OSM at Bromley. In light of the paucity of evidence, the Tribunal could only speculate if there was an intention to have him as a senior CEO, having promised him a try out as OSM, or there was such muddle and disorganisation at Bromley that there was no effective decision-making.
68. A fundamental breach is one that goes to the root of the contract between the employer and the employee. According to the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*,

‘If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.’

69. The term relied upon here was the term of mutual trust and confidence which is implied into every contract of employment. According to *Morrow v Safeway Stores plc 2002 IRLR 9, EAT*, any breach of this term is fundamental. Again, according to the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, there is no duty of reasonableness implied in a contract of employment. To found a fundamental breach, it is not enough that an employer acts unreasonably.
70. The Tribunal found that the conduct relied upon (save for the grievance and return to Maidstone, as set out below) cumulatively amounted to a fundamental breach. The Claimant was approached by the Respondent to go on secondment

to obtain a promotion. The Tribunal found that in practice this secondment, and chance of promotion, was not in good faith. He was openly undermined on this secondment. He was put under pressure to work in a potentially dangerous conditions - without a radio and then blamed for this. He was subjected to long and anti-social hours. His secondment, and chance of promotion, was cut short, as shown by the wages being reduced, without his being informed of this at the time. He was not sure what job he had to go back to - if any - at Maidstone.

71. The Claimant tried to deal with this by way of a grievance. This was delayed for a number of reasons (some of which were not the fault of the Respondent). In the view of the Tribunal the delay over the grievance did not form part of the fundamental breach. Whilst the Respondent's conduct was far from ideal, it fell short of a fundamental breach.
72. Further, the return to Maidstone was not part of the fundamental breach on its own. It was the inevitable result of the Respondent's earlier conduct.
73. The Respondent did not argue that the Claimant had waived any breach. In the view of the Tribunal this was a sensible concession as the Claimant tried, properly, to resolve matters by way of an internal grievance.
74. In the circumstances the Tribunal found that the treatment cumulatively amounted to a breach of the fundamental term of mutual trust and confidence.
75. The next issue was whether such fundamental breach caused the Claimant to resign. A fundamental breach does not have to be the only reason for a resignation, but it must be an operative reason. The Tribunal had little hesitation in finding that the reason for the Claimant's resignation was the Respondent's conduct. He stated this in terms in his resignation letter. He had previously provided a detailed grievance about his concerns on 8 October. Further, the Tribunal could not identify any material factors which might constitute another reason for his resignation.
76. Accordingly, by resigning the Claimant accepted the Respondent's fundamental breach of his contract. This means that he was dismissed.
77. There was no contention that any dismissal was fair and accordingly the Tribunal found that the Claimant was unfairly dismissed.

78. The Tribunal went on to consider unauthorised deduction from wages.
79. The Respondent did pay the Claimant at an increased salary for one month. It failed to pay the increased salary for the second month.
80. The issue was whether or not the Claimant was entitled to his second month of increased wages as a term of contract. Or to put it another way, was there an agreed variation of the Claimant's contract that he be paid at a higher rate for two months?
81. There was very little in writing about the secondment and certainly not enough to be a written variation. The Tribunal went onto consider if there was an oral variation of contract. In the view of the Tribunal, it is more likely that there was at least a possibility on either side that this secondment could be cut short in reasonable circumstances. Therefore, in the absence of anything in writing, the Tribunal could not find that there was a term of contract that the Claimant was entitled to two months' increased wages.
82. Accordingly, the claim for unauthorised deductions from wages must fail.

Employment Judge Nash

Date: 22 October 2019

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