



# EMPLOYMENT TRIBUNALS

## Claimant

Mr J McCarthy

## Respondent

Costco Wholesale UK Limited

v

**Heard at:** Bury St Edmunds

**On:** 11 & 12 December 2019

**Before:** Employment Judge M Bloom

**Members:** Ms S Stones and Mr A Schooler.

## Appearances

**For the Claimant:** In person.

**For the Respondent:** Ms R Wedderspoon, Counsel.

## JUDGMENT

1. The claimant's claims of age discrimination and breach of contract are dismissed upon withdrawal of those claims by the claimant.
2. The claimant's claim of constructive unfair dismissal fails and, as a result, is dismissed.

## REASONS

1. The claimant represented himself in these proceedings. The respondent was represented by Ms Wedderspoon of Counsel. The Tribunal heard evidence from the claimant and five witnesses called on behalf of the respondent. They were Luke Redler, Department Manager at the respondent's central photo lab in Crick. Gary Kelly the manager of the distribution centre in Crick. Susan Knowles the respondent's HR and Marketing Director. Andrew Westwood, a Regional Operations Director. Christopher Glasgow, a Warehouse Manager. The Tribunal also considered the content of a joint bundle of documents consisting of 221 pages.

2. During the course of the proceedings at the time the claimant was invited to make his closing submissions to the Employment Tribunal, he indicated that he wished to withdraw his claims of age discrimination and breach of contract. As a result, those claims are dismissed upon withdrawal by the claimant.
3. There remained to be determined by us the claimant's claim of constructive unfair dismissal.
4. The majority of the facts in this case were not disputed. The respondent is a cash and carry membership warehouse club operating through some 28 warehouses across the United Kingdom. The claimant was employed at the respondent's Milton Keynes warehouse. His employment commenced on 24 October 2005. The respondent has three categories of employees. They are Service Administrators, Service Clerks or salaried employees. As a photo lab technician, the claimant was employed as a Service Clerk. At the time the claimant's employment commenced he was 64 years old. He was 76 years old when his employment came to an end.
5. The claimant's employment was subject to the policies and procedures of the respondent's contained in a document entitled "Employee Agreement". The Employee Agreement (page 61) contained a contractual provision entitling the respondent to allocate to their Service Clerks (obviously including the claimant) a number of different positions either within the same warehouse where they were working (in the claimant's case Milton Keynes) or indeed to different warehouses. At the commencement of his employment the claimant signed an acknowledgement stating that he understood the terms of the Employee Agreement and re-signed a similar understanding on the 8 June 2016.
6. Due to changes in technology reducing the need for photo printing services in 2017 it was decided by the respondent that photo labs were no longer required in each of their warehouses and that this service should be centralised to be run only from the distribution centre in Crick. The closure of the various photo labs would be staggered between August 2017 and March 2018.
7. On 30 September 2017 Mr Westwood and Mr Glasgow met with the claimant. They informed him of the respondent's decision to close down the photo labs which was not something which the claimant was surprised to hear. The claimant, as were all the employees working within the photo labs, was informed that no one would be made redundant i.e. no one would lose their jobs. They would either be transferred to other duties within each warehouse or there was an opportunity for them to relocate to the Crick depot. On the evidence we have heard we are satisfied that the claimant was informed of the possibility of a future re-location to Crick but that he was required to complete the respondent's application for a transfer. The claimant did not give an express indication to Mr Westwood and Mr Glasgow during that meeting that he definitely wished to move to Crick.

8. On 6 December 2017 the claimant expressed an intention to apply for a transfer to the Crick depot. As stated such a request required compliance by the claimant with the respondent's relevant procedure before such an application could be considered. The claimant was required to complete a transfer form which he then must submit to the desired location, together with his appraisal and attendance record. The claimant would then have to wait for approval of that application from the Warehouse Manager responsible for the location to which he wished to be transferred.
9. Although the claimant signed his transfer request form on 20 November 2017 he did not submit this until 10 January 2018. The claimant alleged that the process had been delayed because he had not been given a copy of his latest appraisal. We reject that suggestion. There is no evidence to suggest that this was the case.
10. During this time the respondent took on two employees from the Derby warehouse to work in the Crick depot. There was one remaining vacancy at the time at the Crick depot. One of the claimant's colleagues at the Milton Keynes depot, Giorgio Sopowski applied for that vacancy in October 2017. However, his application at that time was rejected. Once the vacancy at Crick became available again in January 2018, Mr Sopowski re-submitted his application. The respondent decided to give the vacant position at Crick to Mr Sopowski on the basis that he had previously submitted an application whereas the claimant had not done so. Mr Sopowski was, as a result, offered and accepted the vacant position at Crick.
11. As part of his request to move to the Crick depot the claimant attended the Crick depot to look round the premises on 23 January 2018. The respondent was co-operative and he was given a full tour of the premises and shown the equipment that he would be required to operate. Between 29 January and 11 February 2018, the claimant was absent from work as a result of illness. Upon his return to work he agreed to work in the Electrical sales department at the Milton Keynes warehouse. As we have already noted the respondent's Employee Agreement entitled them to invoke a "mobility clause" within those contractual terms requiring the relevant employee, the claimant in this case, to undertake other duties. Working on electrical sales was not something beyond the claimant's capabilities. In fact, following his move to work in that department the respondent continued to pay the claimant the same hourly rate of pay (including his supervisors rate).
12. However, the claimant was adamant that he believed his position had been made redundant and he wanted a redundancy payment from the respondent. On 23 February 2018 the claimant wrote to the respondent making that contention and threatened to bring legal proceedings. Mr Glasgow received that letter and upon receipt he passed the letter to Mrs Knowles the respondent's HR Director.

13. Mrs Knowles responded to the claimant's letter on 8 March 2018. We heard evidence that the claimant received this letter on 12 March 2018. The letter (page 152) fully sets out the respondent's position. It stated:

“You have also been notified that although you missed the opportunity to move to our Crick depot and work within the central photo lab we have promised that you will be able to move to a role as soon there is a vacancy. Given all of the above we disagree that you have been made redundant. You were a service clerk within the photo department and you are still a service clerk within the warehouse.”
14. That letter contained a clear and open confirmation to the claimant that as soon as a further vacancy at the Crick depot arose the claimant would be offered it.
15. It is clear from the evidence we have heard that the claimant had no intention of waiting for such an opportunity. In fact, the day before receiving Mrs Knowles letter the claimant had contacted ACAS with a view to bringing proceedings. He was clearly frustrated and, in our judgment, unreasonably annoyed by the respondent's refusal to make a redundancy payment to him.
16. The claimant did not report for work on 12 March 2018 and in fact did not return to work thereafter. His letter to the respondent dated 12 March 2018 in our judgment constituted a letter of resignation. He resigned from his employment with immediate effect. In fact, a vacancy did later arise at the Crick depot but because the claimant had already terminated his employment and was no longer in communication with the respondent they were unable to offer that position to him.
17. In reaching our judgment in this case we remind ourselves that the burden of proof is upon the employee to establish that he was constructively dismissed. Section 95(1)(c) of the Employment Rights Act 1996 states that “an employee is dismissed if 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”.
18. We remind ourselves of the authority of Western Excavation (ECC) Ltd v Sharp which requires the claimant to establish that the employer committed a repudiatory breach of contract; did the employer's breach cause the employee to resign and thirdly a requirement that the employee does not delay too long after a breach before deciding to resign. The claimant relies on an alleged breach by the respondent that they were in breach of an express term of his contract of employment, namely that he was employed only as a photo lab technician and when this position at Milton Keynes came to an end he should have been entitled to receive a redundancy payment. In addition or as an alternative he relies on an alleged repudiatory breach of the implied term of mutual trust and confidence. In this regard he states that there was a failure by the respondent to offer him an alternative position at the Crick depot.

Secondly, the respondent was in breach of the implied term by denying that his employment was redundant and/or by refusing to pay to him a redundancy payment and/or he alleges that the job working in the electrical department at Milton Keynes did not constitute suitable alternative employment.

19. In our judgment the claimant's allegations are not well founded. As we have already determined the Employee Agreement makes it clear that the claimant's position with the respondent was one of a Service Clerk. Notwithstanding the closure of the photo lab in Milton Keynes that position continued. Although this entailed a move over to the electrical department it was still at the same location, i.e. Milton Keynes and still at the rate of pay the claimant enjoyed in the photo lab. The "mobility clause" contained within the Employee Agreement enabled the respondent to require the claimant to undertake such a move. We do not find that the claimant's position with the respondent was redundant as a result. In coming to this conclusion, we have taken account of the Court of Appeal judgment in the case of the Home Office v Evans 2006/2223. We do not accept further that the respondent was in repudiatory breach of the implied term of mutual trust and confidence. The decision taken by the respondent to prefer Mr Sopowski's application was one which they were entitled to take at the time on the basis that he had previously submitted an application whereas the claimant had not. The respondent made it clear both in verbal conversations with the claimant and in Mrs Knowles letter of 8 March 2018 that as soon as position became available at Crick it would be offered to the claimant. The claimant in effect "jumped the gun" by deciding even before he received the letter from Mrs Knowles that he was going to resign due to the respondent's refusal to make a redundancy payment to him. In our judgment the claimant took a wrong and indeed an unreasonable view as to the respondent's position at that time.
20. There was no fundamental breach by the respondent of either an express term of the claimant's contract of employment or of the implied term of mutual trust and confidence which would justify a claim of constructive unfair dismissal. The claimant's claim, as a result, fails and is as a result dismissed.

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Employment Judge Bloom

Date: 08 January 2020

Sent to the parties on: .....

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For the Tribunal Office