Case No: 2416267/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr G Etchells**

Respondent: **Shop Direct Home Shopping Limited**

Heard at: **Liverpool** **On:** **23 24 and 25 September 2019**

Before: **Employment Judge Benson**

Representation
Claimant: in person
Respondent: Mr R Kohanzad – Counsel

JUDGMENT having been sent to the parties on 5 October 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

Claims

1. This is a claim brought by Mr G Etchells of constructive unfair dismissal and unlawful deductions from his pay. There were other claims brought initially but these have either been withdrawn or dismissed at earlier hearings.

Issues

2. Mr Etchells' says that his resignation from his employment by letter dated 11 May 2018, which resulted in his employment ending on 10 August 2018 was as a result of the conduct of his employer. He alleges that he was therefore dismissed and that his dismissal was unfair.
3. The conduct which he complains about started in December 2016 when the company commenced a regrade of the IT Engineer roles. He relies upon the implied term of trust and confidence and alleges that the respondent breached this term as set out in his Grounds of Claim at paragraphs 30.1 to 30.6. He contends that the conduct of the respondent as set out in these paragraphs led him to resign. In summary these are:

a. Harassment of the claimant in late 2016 and early 2017 to accept a change of grade from a grade G to a grade F which was financially disadvantageous to him, in that at Grade F his overtime payments would not be part of his pensionable pay;
b. Late payment of overtime payments in May 2017 which resulted in the overtime payments not being pensionable;
c. 'Picking and choosing' by the respondent of terms which were applied to the claimant after he decided to remain as a Grade G. Specifically the decision to assess him against Engineers who were a Grade F when considering performance pay awards;
d. Eroding his role as a Teradata DBA specialist;
e. Mr Dan Noon suggesting that he might want to look for work at another company on two occasions in February and March 2018;
f. The claimant's manager, Rob Waterhouse, announcing to colleagues on 28 March that the claimant would be taking on additional responsibilities of managing the team without the claimant having agreed to this and without any offer of additional remuneration. The claimant says this was the last straw.

4. The respondent denies that the claimant was dismissed. It contends that the issues relied upon by the claimant were not sufficient to amount to a breach of the implied term of trust and confidence. No potentially fair reason is pleaded and it relies upon its primary position that the claimant resigned.
5. The claimant also brings a claim of unlawful deductions from pay in relation to payments for additional life assurance which were taken from his salary. It is agreed that the value of this claim is £60. The respondent denies that this amount is owed and contends that the claimant consented to purchasing the additional cover and if, as he alleged, he had been forced by the software to purchase it, he did nothing to change or complain about that and as such had affirmed his position.

Evidence

6. I heard evidence from the claimant Mr Etchells, Mr R Waterhouse the respondent's Interim Head of Data Management, Ms Z Parker the respondent's Employee Relations and Change Manager and Mrs L Harrison, Senior Financial Services Manager. I was referred to an agreed bundle of documents and additional documents from both the respondent and the claimant. I heard submissions from the claimant and Mr Kohanzad including typed submissions from the claimant.

Findings of Fact

7. Mr Etchells had worked in the respondent company since 14 September 1987 and at the time of his resignation on 10 August 2018 was a Senior Systems Engineer (Grade G). He had specialist skills in Teradact and was the respondent's expert in this system.
8. Mr Etchells terms of employment and pay were subject to collective bargaining between the respondent and his union USDAW.
9. In November 2016 the respondent, having undertaken collective consultation and having reached agreement with USDAW, entered into individual consultation with Mr Etchells and his IT colleagues concerning a regrade of the IT roles. There was a history to the grading of IT

employees. Prior to 2013 there were Service Delivery Roles 4, 5 and 6 (SD4/SD5/SD6) Mr Etchells was an SD5. In 2013 all of these roles were a Grade G. This was done for simplicity but it was accepted that within that grade were differing levels of expertise and seniority. It was always envisaged by the respondent that this would need to be addressed in the future. In 2015 the roles were renamed as Principal Service Engineer (PSE), Senior Service Engineer (SSE) and Service Engineer (SE) and in 2016/17 there was a regrading exercise.

10. In the 2016/17 exercise Mr Etchells as a SSE was regraded as an F Grade which was a higher grade in the respondent's structure. The respondent considered that this was a promotion for him. The pay bands for each of the grades EF and G were changed and there was potential for the claimant to progress up the F grade. Mr Etchells pay was near the top of the new grade F pay band. The claimant entered into the individual consultation and engaged with it. He asked questions which were responded to about issues which concerned him. One of those issues was that as Grade F was a management grade, overtime would no longer be part of his pensionable pay. This disadvantaged the claimant financially; he calculated that between £2000 and £3000 per annum would not be paid into his pension scheme. There were other financial benefits in accepting a Grade F but these did not in the claimant's view outweigh the loss of the additional pension contributions.
11. Although not initially apparent at the outset of the consultations, during the individual consultation it was made clear to the claimant that it was his choice whether he wished to accept the change of grade and that he could elect to stay at Grade G. The disadvantage in doing that was there would be limited opportunity for pay rises and it was also made clear to him that in assessing any performance pay going forward, he would be measured against other SSEs, the majority of whom had accepted the regrade to F. To achieve a pay rise he would require a '4' at his performance review and this would be more difficult if he was measured against other SSE's than against Grade G which would have mostly been SEs. Although not in the company's policies, this was something that the company operated in other areas/grades. Each aspect of the 2016/17 IT regrade was agreed with the trade union.
12. The claimant weighed up the advantages and disadvantages to him and decided to stay as Grade G. All issues were confirmed to him by letter. He did not complain about this at the time but he was not happy at the outcome.
13. The claimant continued to work and be a valued member of the IT team. He was the 'go to' person on Teradact and was given additional projects and responsibilities including assisting when IBM were unable to fulfill part of a project they had undertaken. It was clear to me that the claimant was a person who always got on with his work and could be relied upon to carry out the tasks which were given to him. There did come a time in 2017 where he asked for assistance and was provided with a contractor who took on some of his tasks. I do not find that his role was deliberately eroded, as the claimant alleges. The respondent accepts that some of the claimant's duties were passed on to others however I consider this was to assist the claimant and there was no sinister motive in doing this. No evidence has been put before me that the claimant complained about this at the time – he simply got on with his job.
14. There were other issues which irritated him from 2017 onwards including the fact that he discovered other colleagues, specifically a Mr Cohen was

being paid for standby overtime payments when he was rarely called into work, and that overtime payments were on a few occasions paid late, to the advantage of the company who then did not pay pension contributions upon them.

15. There is no evidence before me that the late payments of overtime was anything other than an administrative matter which was not in any way intended to cause any difficulties for the claimant.
16. The claimant raised the payments being made to Mr Cohen with a manager Mr Dan Noon in 2017. He raised this issue again in February 2018 at a time when Mr Noon had decided to leave the company. In the claimant's eyes it was wrong that Mr Cohen was receiving unjustifiable overtime payments whereas he had been deprived of the opportunity to have performance pay rises as a result of the regrade in 2016/7. He asked for a meeting with Mr Noon and at a meeting in February 2018 expressed his dissatisfaction. Mr Noon had at that time submitted his resignation and was due to leave at the end of that month. Noting the claimant's general dissatisfaction, he suggested to the claimant that he ask his old manager Phil Clark who was now at Yodel, a sister company, for a job. He repeated that advice at his leaving celebration on 2 March.
17. With Mr Noon leaving and a decision by the company not to replace him, Mr Waterhouse became the Interim Head of Data and took on his responsibilities in addition to his own. He looked for those in his team who could help him and saw the claimant as the person who could take on the management responsibilities for the Teradact staff and area.
18. He met with the claimant on 27 March having asked if he could have a quick chat with him. In that meeting he explained that with Mr Noon having left he was 'dropping the ball' as he was trying to manage too broad an area. He asked the claimant if he would lead the Teradata team. He was of the view that the claimant would be supportive of him. The claimant didn't say either yes or no but asked 'how much' whilst rubbing together his finger and thumb. Mr Waterhouse said that the claimant would have to speak to Richard George, a more senior manager, as if anyone could secure more pay for him it would be him. Mr Waterhouse left the meeting with the view that the money would be sorted out; that the claimant was supportive of the idea and would take on the extra responsibilities. Mr Waterhouse had previously discussed the claimant with Richard George and knew that he saw him as a key person in the team and was therefore optimistic that the money issue would be resolved.
19. The claimant however had a different view. He thought that as Mr Waterhouse knew that he still felt strongly about the unfairness of the 2016/17 regrade, that Mr Waterhouse would understand that him taking on the additional responsibilities was contingent upon being paid more for it. There was therefore a misunderstanding between the two.
20. On 28 March at the IT team meeting, Mr Waterhouse announced to the rest of the team that the claimant would be running the Teradata team. I accept that the claimant said something along the lines of 'not necessarily'. The atmosphere of the team meetings was such that comments were often made and there was a jovial atmosphere. I accept that the comment was made by the claimant but that Mr Waterhouse either didn't hear it or took it as a jovial comment and not a serious indication that the claimant would not take on the additional responsibility.
21. As Mr Waterhouse assumed that any additional payment would be

sorted out at a higher level, he acted upon his assumption that the claimant had no problem with his plan and emailed the team on 28 March confirming his managerial changes.

22. The claimant was however not happy. He spoke to his colleagues after the email and told them that this was not sorted out yet. On 29 March, he emailed a response to Mr Waterhouse saying: *'That announcement may be a little early. I have not had my meeting with Richard yet and if I don't get a suitable result, I will be leaving too.*' For Mr Waterhouse this was the first occasion that he realised that there may be a problem with his plans.
23. What neither Mr Waterhouse or the claimant knew was that Richard George was also leaving the business. I accept Mr Waterhouse's evidence that he did not know at this time that Mr George had in fact already left. This made it impossible for the claimant to meeting with Mr George and raise the issue of additional pay. The position therefore stalled whilst Mr Waterhouse tried to take the pay issue forward with higher levels of management. In the meantime, Mr Waterhouse met with the claimant to update him and the claimant did not take on the management duties. After discussions with his management and HR on 2 May, they confirmed that the company would not make additional payments to the claimant and this was communicated to him.
24. On 11 May 2018 the claimant wrote to the respondent resigning and giving notice to expire on 10 August. His resignation letter referred to the respondent not resolving the salary and pension issues first raised in December 2016. He considered that the respondent was guilty of bullying through the inappropriate application of the company's policies. He stated he had repeatedly tried to have this matter looked into in order to achieve a satisfactory resolution but the matter hadn't been taken seriously.
25. Following the letter, a meeting was held with Mr Waterhouse and Ms Parker. The claimant did not wish to reconsider his resignation. As the respondent did not put forward any way this situation could be resolved, and by that the claimant meant additional money, he confirmed he had decided to leave.
26. He was offered the opportunity to raise a grievance which he did. The basis of his grievance was set out in his grievance letter and following a meeting with Ms Harrison and appeal meetings, his grievance was not upheld.
27. On 10 August he left the company.
28. In 2017, the claimant had whilst accessing the respondent's on-line benefits system indicated that he wished to increase his life assurance to 4 times his salary from 3 times. This cost him an additional amount each month which was deducted from his salary. This was because the website would not allow him to confirm anything less than a 1 even though he sought to enter a zero. He did not however do anything about this thereafter even though he knew that it was being deducted each month from his payslip. There was a number he could have called but never did so. He was still having those payments deducted at the date of his departure from the respondent.

The Law

Constructive dismissal

29. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. In a case of constructive dismissal, a claimant has to show that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct.
30. The relevant section of the Employment Rights Act 1996 is section 95(1)(c). The leading case is Western Excavating (ECC) Limited v Sharp [1978] ICR 221. In that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
31. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident. The 'last straw' does not by itself need amount to a breach of contract. Lewis v Motorworld Garages Ltd 1986 ICR 157, CA
32. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
33. If the claimant establishes that he has been dismissed, the provisions of Section 98 Employment Rights Act 1996 come into play.
34. Section 98 reads as follows:

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

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

35. It is therefore for the Respondent to show a potentially fair reason for dismissal.

Unauthorised Deductions from Wages

36. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by it. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

37. The relevant provisions are as follows:

"**(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.

(4) …..

(5) …..

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) …."

The decision

Constructive Dismissal

38. I now proceed to apply the law to my findings of fact.

39. Did the respondent commit a fundamental breach of claimant's contract of employment? The claimant relies upon the implied term of trust and confidence. He does not seek to argue that any of the individual issues he raises are breaches of express terms of his contract. I need to consider whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence?
40. I have looked at each issue the claimant raises at paragraphs 30.1 to 30.6 of his Grounds of Claim but also the cumulative effect of each of those issues and his contention that there was a last straw being the request to take on additional responsibilities by Mr Waterhouse.
    a. I find that there was no conduct by the respondent in relation to the 2016/17 regrade which could be said to amount to a fundamental breach of trust and confidence. The regrade was following collective consultation with the USDAW. The claimant's terms and conditions were governed by collective bargaining. The respondent undertook individual consultation with the claimant and gave him the option of accepting the regrade to the higher Grade F or remaining as he was. The claimant decided that the financial implications of moving to Grade F were too detrimental to him and he opted to remain as a Grade G. He did so in the full knowledge that he would be measured for performance pay against his SSE colleagues most of whom were now Grade F. This was not an unreasonable position for the respondent to adopt and indeed it happened elsewhere in the organisation. This had implications for the claimant's potential increases in salary in the future, but he was well aware of that when he decided to remain at Grade G. The fact that an option was to remain on Grade G was not published initially does not in my view matter as the claimant was aware of it during the consultation process. It was this issue which is the background to the claimant's unhappiness with the respondent thereafter.
    b. The issues which during this hearing have been referred to as the 'bits and pieces' are essentially matters which the claimant says added to his ongoing dissatisfaction with the respondent. He does

not seek to argue that they are breaches in themselves but rather conduct of the respondent which added to his view that the respondent didn't want him to stay, ultimately resulting in him resigning.

c. These include the delay in paying him overtime which I have found had no sinister intentions. The decision to pay the overtime to Mr Cohen, which although may appear unfair to the claimant, it is a matter for the respondent to decide how to spend (or waste) their money.
d. Although the claimant is of the view that his role was being deliberately eroded, I do not consider that this was something which the respondent was seeking to do. It may well have been the position that it needed the claimant to carry out additional work on other projects and that his expert skills were not being used to the respondent's best advantage, but there was at the time no objection to this by the claimant. I do not consider, as the claimant suggests, that this was a way of seeking to ensure that other team members had the Teradact skills because they wanted him to leave.
e. I consider that the inference which the claimant drew from the conversations with Mr Noon concerning a new job was not a reasonable one. The claimant had expressed unhappiness with the respondent, Mr Noon was leaving so had no ongoing allegiance to the respondent. He therefore suggested the claimant have a conversation with a colleague. I consider that the claimant with his mindset at the time, being that his role was being deliberately eroded and that he felt the company were wasting money on other staff, he misread Mr Noon's intentions and meaning.
f. Finally, I come to the 'last straw' issue. This was the misunderstanding between Mr Waterhouse and the claimant in March 2018. I consider that had Mr Waterhouse not been given the additional responsibilities and increase in work with Mr Noon leaving, he would have been more sensitive to the claimant's ongoing dissatisfaction about the 2016/17 regrade, and this misunderstanding would not have arisen. It was however against that background that Mr Waterhouse spoke to the claimant and asked him to step up and take on the additional management responsibilities. The answer he hoped for from the claimant was a 'yes'. Although that wasn't said expressly, he thought from the claimant's response which wasn't a no and it was just a matter of money, that it was headed in the right direction and it was just a matter of time before the financial terms were sorted out. The claimant did not at that time or at the meeting on 28 March expressly make it clear to Mr Waterhouse that he would only take on the responsibilities if he was paid more money. He could have done that but he didn't. The misunderstanding and resultant announcement by email cannot therefore be said to have been unreasonable conduct by Mr Waterhouse sufficient to amount to a fundamental breach of trust and confidence.

41. A final straw does not need to amount to a fundamental breach in itself, and I must consider whether the cumulative effect of all of these issues amounted to a fundamental breach of trust and confidence such that the

respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. I find that it did not.

42. Although the claimant has as part of his case raised various issues set out above, from the resignation letter and from the original grievance, I consider that the primary reason for the claimant's resignation was his ongoing dissatisfaction with the respondent's regrading exercise in 2016/17. This left him financially worse off and it came to a head when the respondent would not increase his pay to carry out additional duties in March 2018. He felt aggrieved throughout that time and his unhappiness at the respondent's original decision in 2017 influenced his view of their other actions towards him thereafter. I can understand that unhappiness but that doesn't mean that that is the respondent's fault.

43. As there was no fundamental breach of contract, I find that the claimant was not dismissed. His claim of unfair dismissal therefore fails and is dismissed.

Unlawful deductions

44. For the claimant to succeed in this claim, he must show that the respondent has contravened section 13 Employment Rights Act 1996 by deducting his increased contributions to the life assurance scheme from his salary. He says that he did not authorise that increased deduction. The provisions of section 13 specify that deductions are authorised if an employee has given prior written consent to that deduction.
45. Although the life cover was offered via an online digital system, the claimant accepts that he pressed the accept button on screen. He says he had no choice but to increase the cover as there was a flaw in the respondent's online system. I consider that it was however open to him to notify the company of the flaw and revoke his consent if he had wished to do so, but he did not and by this ongoing inaction I find that he affirmed his decision. That decision provided prior written consent to increase his life cover and as such I find that he authorised the increased cover and consequent deductions from his pay.

46. This claim therefore also fails and is dismissed.

Employment Judge Benson

Date 20 February 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON 21 February 2020

FOR THE TRIBUNAL OFFICE