



EMPLOYMENT TRIBUNALS

Claimant: Mr S Lewis

Respondent: Sony Europe BV

Heard at: Cardiff **On:** 16th March 2020

Before: Employment Judge Howden-Evans

Representation:

Claimant: Mrs E Marshall, Counsel

Respondent: Mr J French-Williams, Counsel

RESERVED JUDGMENT

1. The claimant's resignation did not amount to a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.
2. The claimant was not unfairly dismissed by the respondent; he resigned from his position.

REASONS

1. It is agreed that the claimant was employed by the respondent, as a technician, at its site in Pencoed, South Wales, from 1st September 1998 until 10th June 2019. By email of 10th June 2019, the claimant resigned from his position. He asserts he was entitled to resign because of a repudiatory breach of his contract by the respondent.

2. On 16th August 2019 the claimant notified ACAS in accordance with the early conciliation procedures. The period of ACAS early conciliation lasted until 16th September 2019. On 11th October 2019 the claimant issued these tribunal proceedings, alleging he had been unfairly constructively dismissed. He contends changes to his shift pattern aggravated his severe tinnitus and the respondent did not make the adjustments he needed, which destroyed the relationship of trust and confidence between the parties. He is seeking compensation rather than reinstatement or reengagement.
3. On 13th November 2019, the respondent filed its response to these proceedings. The respondent denied that it had acted in a manner that gave rise to a repudiatory breach of contract. It referred to the claimant having been referred to occupational health and the respondent having followed occupational health advice.
4. This case was listed for a one-day hearing, on 16th March 2020 in Cardiff, before an employment judge sitting alone.

List of Issues

5. At the outset of the hearing, both counsel agreed that this was a classic constructive dismissal case and thus the issues to be determined were:
 - 5.1. Did the respondent breach the implied term of mutual trust and confidence, i.e. did it, 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 it and the claimant?
 - 5.2. Did the claimant "affirm" the contract of employment before resigning?
 - 5.3. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation)?
 - 5.4. If there is a constructive dismissal, did the respondent have a fair reason for it and did it follow a reasonable procedure in relation to it?

The evidence

6. The Tribunal heard evidence from the claimant, Mr Stephen Lewis, and, for the respondent, Ms Donna Evans (Production Manager and the claimant's line manager) and Ms Jessica Jones (who had been Operations Manager for the CMS department and was Ms Evans's line manager). All three witnesses relied upon witness statements, which were taken as read, and they were then subject to cross-examination, the employment judge's questions and re-examination.
7. The Tribunal was referred selectively to a hearing bundle of relevant documentary evidence (of 117 pages).

8. Whilst we were able to finish hearing evidence and closing submissions on the day, the respondent's counsel became unwell and so it was agreed the employment judge would provide a reserved judgment.

Findings of Fact

Background

9. The claimant started employment as a technician with Sony on 1st September 1998. Mr Lewis was one of number of technicians that were responsible for the repair of products that were being manufactured. If a unit failed a technician like Mr Lewis would be called to repair them. His duties included providing test and automated equipment project knowledge to his team; shift equipment maintenance and repair activities, investigation and fault finding, spare part ordering, stock control and liaising with production teams to investigate quality and technical issues. Prior to December 2018, throughout his employment Mr Lewis had predominantly worked a day shift pattern; his usual hours were Monday to Thursday 7am to 4pm and Friday 7am to 12pm.
10. In 2014 Mr Lewis was diagnosed with tinnitus. He described himself as having spontaneous tinnitus, experiencing ringing tones in his left ear. He explained tinnitus can be aggravated by stress, depression, anxiety and lack of sleep. He was advised that regular exercise would help him to manage stress and be able to sleep. Mr Lewis started running and would run 5km each evening Monday to Thursday, followed by going to the gym. He found this enabled him to have a good night's sleep. To his credit he had, prior to 2019, managed to work continuously without taking sick leave for symptoms related to his tinnitus.
11. The respondent manufactures a range of products at its site in Pencoed. Manufacturing operators work on a three-shift model (days, afternoons and nights) and ordinarily, technicians only work a day shift.
12. In December 2018 production was running at a high rate as a particular product's life cycle was due to come to an end in March - April 2019 and managers were concerned that they might not be able to complete manufacturing the required number of products in time with the deadlines. Managers identified that technicians were struggling to stay on top of the repairs as repairs were developing in the afternoon and night shifts and technicians were not available to diagnose and repair these 'live'. This was creating a large repair pile in the morning and creating delays in manufacturing.
13. To overcome this problem a business decision was taken to temporarily place all the technicians that were working on this product on a two-shift model; this meant each technician would work one week of day shifts (7am to 4pm) followed by one week of afternoon shifts (3pm to 11pm).
14. Shortly before Christmas 2018, Ms Evans and Charlotte Davies (Production Manager) convened a meeting with all of the technicians working on this project (approximately 5 technicians). They explained the need to adopt a two-shift pattern, to overcome the problems completing this particular product. In oral evidence, Mr Lewis accepted that during this meeting he (as well as other technicians) was told

this was a temporary shift pattern change until the end of this project's life cycle. Everyone was told the new shift arrangements would come into effect on 7th January 2019. Technicians were provided with an additional shift allowance on top of their usual salary.

15. In oral evidence, Mr Lewis accepted he had not mentioned his tinnitus or any concerns about the impact the shift pattern would have on his health to managers, at this meeting (December 2018) or at any time prior to the meeting on 22nd March 2019.
16. On 7th January 2019, technicians started working the new shift patterns. Of the 5 technicians, one person remained on day shifts as he was the only person that had completed training to repair a particular product and the manufacture of that product was only running on day shifts.
17. Another technician had been on sick leave for over 12 months and returned to day shifts only because of his medical condition.
18. To his credit, despite having concerns about the impact on his health, Mr Lewis decided to "give it a go" in relation to the new shift patterns. He started working the afternoon shift on 14th January 2019. He worked an afternoon shift pattern that week and the week commencing 28th January 2019 (with a day-shift week in between).
19. At some point at the end of January / start of February, during casual conversations Mr Lewis complained to Ms Jones and subsequently to Ms Evans about the new shift pattern. Mr Lewis accepts he did not mention his tinnitus or health in these conversations. Ms Jones believed the new shift pattern was impacting on Mr Lewis's ability to play in a band at the end of the week; she suggested he approach Ms Evans to see if there was something they could do to work around this. Ms Evans formed the impression that Mr Lewis didn't want to work afternoon shifts because he taught ukulele on Thursday evenings and occasionally played in a band on Friday evenings. She also remembered Mr Lewis mentioning he was finding it difficult to adjust to different hours given his age. She agreed he could use float hours (Mr Lewis was entitled to 62.4 float hours) to be able to finish work at 7pm rather than 11pm on Thursdays and Fridays. She also agreed that when his float hours had run out, she would change his afternoon shifts to 12pm to 8pm whenever possible, to further support Mr Lewis.
20. After a day-shift week (beginning 4th February), Mr Lewis worked an afternoon-shift week with adjusted hours on Thursday and Friday (12pm to 7/8pm rather than 3pm to 11pm). The week beginning 18th February Mr Lewis worked a day-shift week and this was followed by a further adjusted afternoon shift week in the week beginning 25th February (ie working 12pm to 7/8pm on Thursday and Friday). The week of 4th March 2019, Mr Lewis worked a normal day-shift week.
21. By 11th March (when he was due to start another afternoon-shift week) Mr Lewis was finding his sleep pattern had been disrupted by insomnia. When he was working the afternoon shift, he didn't have time to exercise after work and this meant he was finding it hard to sleep with his tinnitus. He had previously tried sleeping medication but discontinued this due to the side effects. He saw his GP on 11th March and was signed off work with tinnitus for 5 days.

22. On 14th March 2019, his GP provided him with a fit note that states *“you may be fit for work taking account of the following advice....If available and with your employer’s agreement you may benefit from altered hours”*. In the comments part underneath this, Mr Lewis’s GP recorded *“Struggles with severe tinnitus and insomnia, being on late shift exacerbates symptoms markedly. Would benefit from earlier (day) shift pattern.”* The note ended with *“This will be the case for long term.”*
23. On 15th March, Mr Lewis gave his fit note to Ms Evans and told her he couldn’t do afternoon shifts anymore. Ms Evans told him she would discuss this with Ms Jones and would come back to him as soon as possible. Having taken advice from HR, Ms Evans referred Mr Lewis to occupational health and requested an appointment as soon as possible.
24. The occupational health report of 21st March 2019 concludes
- “Therefore, from a medical perspective, although he is clearly experiencing some symptoms at present and his management of his condition is based on exercise to sleep, it is my view therefore, that this requires an organisational outcome rather than a medical one, albeit advised in this letter and the letter from his GP, if accommodations can be made for him to stay on a day shift, it would be advocated to allow him therapies and adaptive coping mechanisms to control his underlying medical condition.*
- Steven states he would not work afternoons and therefore, if and when a solution is found for these issues, I see no medical reason why he should not be within the workplace. Please note that occupational health is an advisory service and the adjustments and/or recommendations in this report whilst appropriate to the health of the employee, do not preclude alternatives. The outcomes and actions taken are the responsibility of management.”*
25. Mr Lewis attended a meeting with Ms Evans and Ms Jones on 22nd March 2019, to discuss the occupational health report. The report had not arrived yet, so Ms McKenzie, the respondent’s HR assistant, spoke to the occupational health adviser and had a verbal handover. Ms McKenzie noted *“cannot say categorically that medical reason not to work shifts – how he manages advocates reasoning. Management decision if we can accommodate. Write to GP? If business can’t accommodate management issue.”* Ms McKenzie relayed this advice to Ms Jones.
26. Mr Lewis interpreted his GP note and the comments he had received during the occupational health appointment as saying that he could not work an afternoon shift; he attended the meeting expecting his employer to put him back on day shifts.
27. Ms Jones and Ms Evans understood the occupational health advice and the GP’s assessment of the situation was they were not saying Mr Lewis could not work afternoon shifts, but if it was possible to accommodate day shifts Sony should do this. Ms Jones said if the advice from occupational health (or the GP) was that Mr Lewis needed to be placed on the day shift to be able to return to work, she would have made this adjustment; the difficulty with the advice the managers received was it was all framed to be “preferable” rather than necessary.

28. When his managers discussed their understanding of the GP note and occupational health advice Mr Lewis felt his managers were not supporting him. Mr Lewis was told that the project that required the two-shift pattern was coming to an end and then he would be able to return to day-shifts only. He was told they could not say he could permanently be on day-shifts, as on future projects there may be times he was needed to work different shifts as and when the company needed it.
29. Mr Lewis was upset by this news and explained he'd been having suicidal thoughts. At this point, the meeting was adjourned for 10 minutes whilst Ms Jones sought HR advice. When Ms Jones returned, she encouraged Mr Lewis to immediately attend his GP and provided Mr Lewis with phone numbers for support groups. Ms Evans also said Mr Lewis could work a day-shift pattern that week, to give him opportunity to seek help with his GP.
30. Mr Lewis saw his GP later that day and was signed unfit for work for 28 days, with tinnitus / insomnia. (Mr Lewis did not return to work prior to his resignation).
31. Whilst Mr Lewis was on sick leave, Sony finished manufacturing the particular product that had required a change in shift pattern, so on 15th April 2019 technicians started to revert to working day-shifts only. In oral evidence, Mr Lewis accepted that by May 2019, he was aware that if he returned to work he would be returning to work day-shifts only, however, he said he needed to be told he could return to day-shifts permanently.
32. On 17th May 2019, Mr Lewis was signed off for a further period of 2 months. Upon receipt of this sick note, the respondent arranged a further occupational health appointment for Mr Lewis. Mr Lewis attended an occupational health telephone consultation on 6th June 2019.
33. Before he received the latest occupational health report, Mr Lewis resigned from his position with Sony. In his email of 10th June 2019, he explained he felt managers had been unable to care or understand his medical condition and had not taken the advice given by medical practitioners. By letter of 17th June 2019, Ms McKenzie accepted Mr Lewis's resignation and confirmed Mr Lewis's last date of employment would be 8th July 2019. She enclosed a copy of the respondent's grievance procedure and explained Mr Lewis was entitled to raise a grievance if he wished.
34. In June 2019, Mr Lewis learnt of a job becoming available with the council. This was working day-shift type hours and Mr Lewis explained he understood it was going to be a permanent position, albeit at slightly less pay than his role with Sony. Mr Lewis started work in this new job on 8th July 2019.
35. On 8th August 2019, Mr Lewis submitted a grievance of "constructive dismissal", indicating he felt managers had not followed medical advice to keep him on a day-shift pattern.
36. By letter of 2nd September Mr Lewis was invited to attend a grievance investigation meeting with Nabila Elias, Senior Manager with the respondent. On 12th September 2019, Mr Lewis attended the grievance meeting with Ms Elias. Ms Elias subsequently investigated Mr Lewis's grievance by separately interviewing Ms Jones and Ms Evans and others.

37. After a comprehensive investigation, by letter of 30th September 2019, Ms Elias confirmed she was not upholding the grievance. In particular she notes none of the medical reports “*support your belief that you were medically unable to work afternoon shifts*”. She also found Sony had offered to accommodate Mr Lewis’s request to work day-shift pattern once the project had come to an end.

38. Mr Lewis did not appeal the grievance outcome.

Respondent’s submissions

39. The respondent’s counsel presented oral submissions, referring the employment tribunal to the change to shift pattern being a temporary change, to managers supporting Mr Lewis by allowing him to change his afternoon shift hours where possible to accommodate his ukulele teaching and band commitments, to Mr Lewis not having raised issues with his tinnitus until 14th March 2019, to managers responding promptly by seeking occupational health advice and to the medical evidence suggesting day-shift pattern being preferable, rather than necessary. Respondent’s counsel suggested managers had been proactive in seeking a second occupational health report and subsequently by encouraging the claimant to submit a grievance and fully investigating that grievance.

40. Counsel for the respondent highlighted by the time of his resignation the claimant knew he could have returned to day-shift only work pattern. He submitted there had been no fundamental breach of contract by the respondent and asserted the claimant had resigned as he had found alternative employment.

Claimant’s submissions

41. The claimant’s counsel also presented oral submissions. She submitted the claimant had been told he may have to work two-shift patterns again in the future. The two-shift pattern had overcome the problem in manufacturing this product and could have been used again.

42. The claimant’s counsel highlighted that Mr Lewis had tried to work the new shift patterns for a number of months but had become increasingly unwell, demonstrating he couldn’t work afternoon shifts. She asserted the managers should have gone back to the GP for advice given the ambiguity in the medical evidence and made it clear to Mr Lewis that he could return on day-shift only in April. She submitted there had been a breach of the implied term of trust and confidence in that the employer had failed to give a proper consideration to Mr Lewis’s health, safety and wellbeing and this was the reason for Mr Lewis leaving Sony. She highlighted the new job was temporary and for less pay.

Relevant law

43. As the claimant resigned his employment and relies upon a constructive dismissal, he must establish that he terminated the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the respondent employer’s conduct (section 95(1)(c) Employment Rights Act 1996).

44. The relevant principles are found in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221. The test of a constructive dismissal is a three-stage one: (1) was there a fundamental breach of the employment contract by the employer? (2) did the employer's breach cause the employee to resign? and (3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?

Discussion

45. Returning to the issues that were identified at the start of the hearing:

Did the respondent breach the implied term of mutual trust and confidence, i.e. did it, 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 it and the claimant?

46. Claimant's counsel has submitted that the employer breached this implied term by failing to give proper consideration to Mr Lewis's health, safety and wellbeing. The employment judge accepts that prior to the GP's note of 14th March 2019, Ms Jones and Ms Evans were not aware that the change in shift pattern was having any impact on Mr Lewis's tinnitus or health. Prior to that, they had both reasonably believed his dislike of the afternoon shift pattern was linked to his ukulele teaching and commitments with his band. Mr Lewis did not take any sick leave until 11th March; he had worked the new shift pattern for two months by that point in time.

47. As soon as Ms Jones and Ms Evans were aware of the problems Mr Lewis was experiencing with his tinnitus, they acted reasonably by requesting an urgent occupational health assessment and arranging a meeting with Mr Lewis to discuss the situation. That medical evidence did not say, as Mr Lewis asserts, that Mr Lewis cannot work afternoon shifts; rather it says working day-shifts was preferable. Ms Jones and Ms Evans were entitled to interpret the medical advice they had received as they did. Everyone, including Mr Lewis knew the change in shift pattern was a temporary change to be able to meet the deadlines with this particular order which were due in March / April 2019. Ms Jones and Ms Evans were entitled to ask Mr Lewis to carry on the two-shift pattern for such a short period of time. When Mr Lewis referred to suicidal thoughts, they acted appropriately in adjourning the meeting, seeking advice and encouraging him to urgently see his GP. They also made arrangements for him to work a day-shift only pattern for that week, to enable him to get further advice.

48. Subsequently, there could have been more contact with Mr Lewis whilst he was off work, and in particular, Ms Jones or Ms Evans could have written to him in April 2019 indicating that when he was well enough to return to work, technicians were reverting to day-shifts only. However, when the May 2019 GP note arrived, Mr Lewis was, quite properly referred to occupational health for a further assessment without any delay.

49. In the circumstances, the employment judge is satisfied that the respondent did give proper consideration to Mr Lewis's health, safety and wellbeing, as soon as they were aware of Mr Lewis's circumstances and subsequently adopted a reasonable approach to Mr Lewis's circumstances. The employment judge does

not accept Ms Jones or Ms Evans has acted in a manner calculated or likely to destroy or seriously damage Sony's relationship of trust and confidence with Mr Lewis. There has not been any fundamental breach of contract on the part of the employer.

Did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation)?

50. Further and in the alternative, Mr Lewis was aware (through other technicians) that technicians were returning to day-shift only work patterns. During oral evidence, Mr Lewis explained that at the point of his resignation, his objection was that he needed his employer to say he could permanently work a day-shift only pattern. He had only discussed this in a single meeting with his managers, at which point they had not yet received the occupational health report. He had not explored this further with his employer. The employment judge accepts that Mr Lewis would have been returning to a day-shift only pattern, had he returned to work in summer 2019. The employment judge considers it unlikely that the lack of a guarantee of permanent day-shift only work was a reason for leaving this employment. Given the date of his resignation (10th June 2019) and the date he started new employment (8th July 2019), the employment judge accepts that his only reason for resigning was that he had found alternative employment, which he believed would be a permanent position.

Decision

51. The claimant's resignation did not amount to a constructive dismissal within the meaning of section 95(1)(c). The claimant was not unfairly dismissed by the respondent – he resigned from his position.

Employment Judge Howden-Evans

Dated: 13th April 2020

JUDGMENT SENT TO THE PARTIES ON 16 April 2020

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS