EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107520/2019

5

Held in Glasgow on 28, 29 and 30 October 2019

Employment Judge P O'Donnell

10	**Mr CG Gordon**	**Claimant** **Represented by:** **Mr T Pacey -** **Counsel**
15	**J & D Pierce (Contracts) Ltd**	**Respondent** **Represented by:** **Mr C Edward -** **Counsel**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was not dismissed as defined in s95(1)(c) of the Employment Rights Act 1996. In these circumstances, his claim for unfair dismissal was not well founded and is dismissed.

25

REASONS

Introduction

1. The Claimant has brought a complaint of constructive unfair dismissal. The claim is resisted by the Respondent.

Evidence

30 2. The Tribunal heard evidence from the following witnesses:-

   a. The Claimant
   b. Colin Kerr, the Respondent's Senior Commercial Manager
   c. Andrew Wallace, a quantity surveyor employed by the Respondent

d. Angus Cormie, the Respondent's Chief Engineer
e. Derek Pierce, the Respondent's Managing Director
f. John Brown, a director of the Respondent
g. Andrew Caldwell, a director of the Respondent

5 3. There was an agreed bundle of documents prepared by the parties. References to page numbers below are references to pages in the joint bundle.

4. This was not a case where there were significant disputes of fact about the events that lead to the end of the Claimant's employment with the Respondent. Any dispute tended to be about the interpretation which should be placed on
10 what happened or the weight that should be placed on events.

5. The only significant dispute of fact relates to what was said and done by the Claimant and Mr Pierce on 13 February 2019, both in relation to what happened in Mr Pierce's office when there was an aborted meeting between the Claimant, Mr Pierce and Mr Caldwell and in relation to subsequent
15 interactions between the Claimant and Mr Pierce on that day.

6. There was no consistent description of the detail of what happened at the aborted meeting in Mr Pierce's office between the Claimant, Mr Pierce and Mr Caldwell although they were all in the agreement that the Claimant refused to attend that meeting. The dispute relates to the detail of the words used by the
20 Claimant and Mr Pierce, whether Mr Pierce raised his voice in speaking to the Claimant and how the Claimant passed documents he had brought to the meeting to Mr Pierce.

7. Similarly, there is a dispute between Mr Pierce and the Claimant as to whether Mr Pierce raised his voice to the Claimant in a subsequent telephone call on
25 the same day. In this, the Claimant is supported by the evidence of Mr Wallace who said that he could hear Mr Pierce on the telephone from his desk which was some distance from the Claimant's desk (he described as being approximately the same distance between the witness table and the clerk's table in the Tribunal room).

8. Finally, there was all a dispute between Mr Pierce and the Claimant about their subsequent interaction on 13 February immediately prior to the Claimant's suspension on that day.

9. For reasons which will be addressed more fully below, the Tribunal was of the view that the events of 13 February, whilst being the trigger for the sequence of events leading to the Claimant's resignation, were not of fundamental significance when considering whether there had been a fundamental breach of contract especially given that the Claimant was advancing a "last straw" case.

10. With that being said, the Tribunal broadly preferred the evidence of the Claimant to that of Mr Pierce in relation to these disputes of fact on the basis that the Claimant's evidence was more consistent with that of Mr Caldwell and Mr Wallace. This is not to say that the Tribunal considered that Mr Pierce was being untruthful but, rather, that his recollection of events was influenced by how he interpreted what was being said and done on the day.

Findings in fact

11. The Tribunal made the following relevant findings in fact.

12. The Claimant had been employed by the Respondent as their commercial manager from 21 July 2008 until he resigned on 9 April 2019.

13. The Respondent operates in the construction industry working on various projects providing structural steelworks for buildings. They operate throughout the UK and the number of projects in which they are engaged can vary at any given time.

14. On 12 February 2019, there was a cash flow meeting involving the Claimant, Mr Pierce, Mr Brown and Mr Caldwell. At the meeting, Mr Pierce expressed concern at the cash coming into the business and the management accounts of the Respondent which had been prepared in January 2019 did show that the cashflow was slow.

15. At the same meeting there was a discussion about the Queen Street project; the main contractor on the project was insisting that the Respondent had tendered on the basis of working night shift but Mr Pierce thought that this wrong. There was confusion amongst those present at the meeting as to what the correct position was and so Mr Pierce asked the Claimant to meet with him and Mr Caldwell at 8am the next day so that they could sit down with the contract file and the tender file to go through it page-by-page and confirm what had been agreed.

16. The Claimant worked late on 12 February 2019 to prepare papers for the meeting.

17. On the morning of 13 February 2019, the Claimant received a number of emails from Mr Pierce which he found to be aggressive and intimidating. The emails are produced at pp54 and 55 with the Claimant being particularly concerned with the use of capitals in the email of 6.23 am and the use of the word "bloody" and the phrase "what the hell is going on in your department" in the email of 6.20am.

18. The Claimant was apprehensive about attending the meeting with Mr Pierce and Mr Caldwell at 8am as a result of receiving these emails.

19. The Claimant went to Mr Pierce's office for the meeting, bringing the relevant contract documents which were to be reviewed. He put the documents on Mr Pierce's desk; Mr Pierce describes the Claimant as throwing or tossing the documents on to his desk; Mr Caldwell described it as "launching" the documents; the Claimant disputes these descriptions.

20. Although the Tribunal prefers the Claimant's description of how he put the documents on the desk, it was clear that both Mr Pierce and Mr Caldwell saw his actions as being dismissive and disrespectful.

21. The Claimant then left Mr Pierce's office and did not attend the meeting as requested. Mr Pierce spoke to the Claimant as he left the room but, again, the detail of what was said is in dispute; Mr Pierce says that he asked the Claimant what he was doing; Mr Caldwell described Mr Pierce as saying that the

Claimant had "better think about what you are doing"; the Claimant said that Mr Pierce had said that the Claimant had "better be careful".

22. Again, the Tribunal prefers the Claimant's version of events as it is, to a degree, supported by Mr Caldwell.

23. The Claimant describes Mr Pierce as raising his voice when speaking to him and Mr Pierce accepted that he may have done but this was when the Claimant was out of the room and he was trying to be heard.

24. The Claimant returned to his desk and shortly thereafter received a phone call from Mr Pierce about what had happened at the aborted meeting. The Claimant describes Mr Pierce as shouting during this call and this is supported by the evidence of Andrew Wallace who heard Mr Pierce's voice on the telephone from his desk some distance away.

25. Mr Pierce then came down to Claimant's office; the Claimant was not present as he had gone to the kitchen to make a cup of tea. Mr Pierce found the Claimant and advised him that he was being suspended in relation to this refusal to attend the meeting. This was confirmed by an email at 9.14am (p55).

26. Mr Caldwell then went down to the Claimant's office to make sure the Claimant left. He asked the Claimant to leave his phone and laptop; the Claimant asked if he could take some personal files off the laptop and Mr Caldwell agreed to this. The Claimant did not immediately leave but went to the office manager's room, closing the door behind him. Mr Caldwell waited for the Claimant who came out, collected his personal effects and left the premises.

27. The Claimant was then sent a letter dated 14 February 2019 (p57) asking him to attend a disciplinary hearing on 18 February 2019 with John Brown, one of the directors of the Respondent. The Claimant was concerned about the short notice and that the Respondent was not following their own procedures. He therefore sought advice from a legal adviser who was assisting him with another matter, George McKeown. Mr McKeown wrote to the Respondent by letter and email dated 17 February 2019 (pp58-60) requesting that the meeting

is postponed to allow the Claimant to properly prepare for it. He also pointed out that the Respondent's own disciplinary policy (pp40-42) stated that there should be an investigation before any disciplinary hearing is held.

28. Mr Brown wrote to the Claimant by letter dated 18 February 2019 (p61) advising him that the reference to a disciplinary hearing in the letter of 14 February was a mistake and that it should have referred to an investigatory meeting. He advised that this had been arranged for 21 February 2019.

29. The Claimant attended the meeting with Mr Brown on 21 February and explained what had happened on 13 February 2019 from his perspective. No minutes of this meeting were ever produced.

30. From the information provided at the meeting, Mr Brown identified other employees who were relevant to his investigation; Laura Hutchison, Andrew Wallace and Sean Steven, all of whom he interviewed. He also interviewed Mr Pierce, Mr Caldwell, Julie Rose (the office manager) and Gwen Goldie. No minutes or notes of these meetings were ever produced to the Claimant or to the Tribunal.

31. Mr Brown did not then convene a further disciplinary hearing or speak to the Claimant about what other witnesses said about the events of the 13 February. Rather, he issued a letter dated 27 February 2019 (p66) to the Claimant informing the Claimant that he had concluded the disciplinary process and that he had found that the Claimant had committed an act of gross misconduct in terms of the Respondent's disciplinary policy on the basis that there was a "refusal to carry out reasonable management instructions".

32. He went on to say that, although dismissal was a possible sanction for gross misconduct, he considered that, in light of the Claimant's long service and clean disciplinary record, a final written warning to be held on the Claimant's record for 12 months was the appropriate sanction.

33. The letter concluded by advising the Claimant's suspension was now lifted and that he should report to the head office at 8am on 4 March 2019 for a back to work induction. In the event, the Claimant did not return to work on 4 March

as he was signed off sick by his doctor. The Claimant remained on sick leave until his employment terminated on 9 April 2019.

34. The Claimant appealed the outcome of the disciplinary process by email and letter dated 3 March 2019 (pp67-69). In the same letter he indicated that he wished to raise a grievance in relation to alleged bullying by Mr Pierce.

35. On 8 March 2019, Mr Pierce emailed all staff informing them of the appointment of Colin Kerr as senior commercial manager. Mr Kerr was an existing employee in the estimating department who had previously worked for the Respondent as commercial manager from 2000 to 2008. He had returned to work for the Respondent in January 2018.

36. The creation of this role had arisen due to a number of factors. There had been a concern from both Mr Pierce and the Claimant about the resourcing of the commercial department for some time. An apprentice had been recruited in 2018 but Mr Pierce remained concerned that a more senior appointment was needed to deal with the workload.

37. After the Claimant was suspended, Mr Caldwell had stepped in to oversee the work of the commercial department and supervise the more junior staff. During this time, a number of issues had arisen which caused concern to Mr Pierce relating to contracts not being valued properly, variations not being priced correctly, the recovery of payments and other loose ends.

38. Mr Pierce therefore decided to create this new role which would be above the Claimant in the Respondent's hierarchy and approached Mr Kerr to fill the role. The intention was that the new role would be an additional level of checking, could take on some projects and relieve some of the pressure on the Claimant.

39. There was no consultation with the Claimant in advance of Mr Kerr's appointment nor was there any discussion with him up to his resignation as to how the new role would fit in with his existing role. Indeed, the Claimant only found out about the appointment about a week later through other employees who sent him the email from Mr Pierce making the announcement.

40. The Respondent replied to the Claimant's appeal by letter dated 13 March 2019 (p74). This letter dealt with a number of matters acknowledging the Fit Notes which the Claimant had submitted and advising him that they wished to invite him to a further investigation meeting in relation to "various significant adverse variances in financial reporting in recent months". The letter warned that this process may lead to disciplinary action.

41. In respect of his grievance, the letter of 13 March asked the Claimant to set out the grounds of his grievance. It also asked if he was able to attend hearings in respect of his appeal and grievance during his absence on sick leave.

42. By letter dated 14 March 2019 (p75), the Claimant made a subject access request to the Respondent which was acknowledged by letter dated 15 March 2019 (p80).

43. The Claimant responded to the Respondent's letter of 13 March by letter dated 15 March 2019 (pp77-78). He indicated that he was only willing to attend any further investigatory hearing if certain conditions were met regarding the provision of information about any meeting in advance. In respect of his appeal, the Claimant indicated that he did not consider that this could proceed until the information sought in his subject access request had been provided. As regards his grievance, he asked for confirmation of to whom he should address this and who would deal with it.

44. The Claimant set out the grounds of his grievance in a letter to John Brown dated 21 March 2019 (pp82-87). The Respondent acknowledged receipt by letter dated 22 March 2019 (p88) and asked if the Claimant wished to delay the grievance hearing until his subject access request had been answered. The Claimant replied by letter dated 27 March 2019 (p89) that he did not ask for a delay to the grievance.

45. By letter dated 29 March 2019 (p90), the Respondent invited the Claimant to a grievance hearing on 3 April 2019. Prior to that hearing, the Claimant sent the Respondent a revised version of his grievance letter on 1 April 2019 (pp91-96). The letter of 1 April substantially repeats the original grievance letter of 21 March and the changes appear as an addendum at the end of the letter (p95-

96). In this addendum, the Claimant raises issues about the new investigation process, the progress of his appeal and his concerns about the appointment of Mr Kerr.

46. Mr Brown did not consider that this addendum was a revision or addition to the grounds of the Claimant's grievance. He did not, therefore, approach the meeting on 3 April 2019 prepared to deal with the issues raised in the addendum.

47. The grievance hearing proceeded on 3 April 2019 and notes of the meeting are at pages 97-105. The meeting discussed the issues raised in the Claimant's original grievance letter.

48. During the meeting, the Claimant raised the issue of the appointment of Mr Kerr and indicated that he believed that he had either been demoted or replaced. Mr Brown replied that neither was the case and that the Claimant's job was still there but that there was now also a senior commercial manager to oversee that part of the business. The Claimant raised concerns about not being consulted and Mr Brown replied that the Respondent did not need to consult with him about the decision but that he would have been told about it if he had not been off sick. When asked by the Claimant what his (that is, the Claimant) duties would have been if he had returned at the end of his suspension, Mr Brown replied that they would have been the same.

49. Mr Brown did ask the Claimant when he planned to return to work and the Claimant advised he would see his doctor on Friday. The Claimant went on to comment that he would come back but his job was gone. Mr Brown replied that no-one had told the Claimant that.

50. During a further exchange, the Claimant stated that he was to return to a new role to which Mr Brown replied "No, same role, exactly".

51. On 4 April 2019, the Claimant sent two letters to the Respondent. The first letter (pp106-107) raised a number of points of clarification and observation about the Claimant's grievance and what had been discussed at the meeting on 3 April. The second letter (pp108-109) dealt specifically with the Claimant's

concerns and complaints about the appointment of Colin Kerr and the Claimant's belief that Mr Kerr was doing the Claimant's job.

52. By letter dated 9 April 2019 (pp110-11), the Claimant resigned from his employment with the Respondent. The letter was hand delivered and was acknowledged by the Respondent by letter the same day (p112).

53. The Claimant's letter of resignation sets out a series of incidents which led to his resignation:-

    a. The conduct of Mr Pierce at a meeting on 5 October 2018.
    b. The contents of an email dated 30 November 2018 sent by Mr Pierce to the Claimant.
    c. The conduct of Mr Pierce at a meeting on 8 February 2019.
    d. The events of 13 February 2019.
    e. The subsequent disciplinary process followed by the Respondent.
    f. The lack of information about the further investigation raised in the Respondent's letter of 13 March 2019.
    g. The appointment of Colin Kerr and the Claimant's belief that Mr Kerr was carrying out his job.

54. The Claimant's role remains vacant and the Respondent have not filled it since his resignation.

Claimant's submissions

55. The Claimant's agent made the following submissions. A schedule of loss was produced to the Tribunal setting out the sums sought by the Claimant.

56. This was an unfortunate case where the relationship between the Claimant and Mr Pierce was at the heart of it. The relationship was successful at first but began to deteriorate due to the pressure of the growth of the business.

57. Mr Pierce had tried to suggest that the Claimant was not happy because he had not been appointed as a director but he was not involved in any campaign against the directors. He had no warnings and had been paid a discretionary bonus.

58. Counsel for the Claimant had seen the skeleton argument produced by the Respondent's Counsel and agreed with the legal principles which apply in this case. This was a case where the Claimant relied on the "last straw" doctrine and that the onus was on the Claimant to prove that there had been a breach of contract. The term of the contract relied upon was the implied term of trust and confidence.

59. The Claimant's letter of resignation at pp110-111 set out the reasons for the Claimant's resignation and have to be considered in their totality. These reasons are borne out by the evidence.

60. The events of 13 February 2019 had to be viewed in the context of how the day unfolded. It starts with the emails at page 54 which were aggressive in the words used and punctuation. These caused the Claimant concern. In relation to the events of the meeting in Mr Pierce's office, it was submitted that Mr Caldwell's description of how the Claimant put the documents on the desk and what was said were similar to the Claimant's evidence.

61. Further, Mr Wallace's evidence of the phone call between the Claimant and Mr Pierce, in particular the fact that he could hear Mr Pierce, supported the Claimant's version of events.

62. Mr Pierce's own evidence confirmed that there was no dialogue regarding the Claimant's suspension, no period to allow for everyone to cool down and no attempt to bring in another manager. In fact, they never spoke again and that destroyed the trust and confidence.

63. The Respondent did not follow their own disciplinary policy in dealing with the subsequent disciplinary process. The Claimant was not given an opportunity to respond to the allegations and the Respondent should not have looked at the Claimant's conduct in isolation. This was not gross misconduct; it was a first failure to obey instructions. These failings were not remedied on appeal as there was no appeal ever held.

64. It was submitted that the appointment of Colin Kerr was not a breach of contract in itself but it was the circumstances of it and the failure to explain it. It was

said to be a new and distinct role but no commercial manager has been employed by the Respondent since the Claimant left. There was a legitimate concern that the Claimant was redundant or demoted.

65. The chronology of Mr Kerr's appointment is important; it was done one month after the Claimant was suspended; he was not informed of the appointment or the intention to appoint a senior commercial manager. The Claimant had been replaced as the senior person in the department and had had his line manager replaced.

66. The Claimant had raised these issues in his grievance and the grievance meeting; Mr Brown was on notice about this issue and knew the reasons for the appointment but did not provide that explanation in the grievance meeting. There was no good reason for no explanation to be given.

67. There was no response to the Claimant's letters of 4 April and so he considered his position and resigned. The totality of the Respondent's conduct destroyed the trust and confidence.

68. It was submitted that the Claimant was not aware of the alleged performance issues raised in the ET3 and so could not have resigned because of these. Similarly, the appointment of Mr Caldwell and Mr Brown as directors was in the previous year so cannot be the reason for his resignation.

69. In relation to any question of contributory conduct, it was accepted that the Claimant refused to attend the meeting on 13 February but there were reasons for this.

70. It was submitted that this is a "last straw" case with the last straw being the failure to adequately explain the appointment of Colin Kerr at the grievance hearing. The last straw has to contribute to the breach but does not have to be the same or related to any previous breaches. The Tribunal was urged to look at the totality of the Respondent's conduct; the Claimant should have had confidence that the grievance would be dealt with properly but when he looked back at what was done, trust had been destroyed.

71. It was submitted that the Tribunal should compare the immediate response to the Claimant's resignation to the failure to respond to the letters of 4 April. The Claimant should not be criticised for trying to engage with the Respondent via those letters and he was not affirming the contract by doing so.

5 **Respondent's submissions**

72. The Respondent's agent produced written submissions and supplemented these orally.

73. Mr Edward started by dealing with the issue of the lack of response to the Claimant's letters of 4 April 2019; this date was a Thursday and the Claimant 10 resigned on the Tuesday with a weekend between those dates.

74. It was submitted that the issues to be determined by the Tribunal were as follows:-

   a. Was there a constructive dismissal?
      i. Was there a material breach of the contract of employment by 15 the Respondent?
      ii. If so, did the Claimant resigned in response to that breach?
      iii. Did the Claimant act in such a way as to affirm the contract after the Respondent's breach?
   b. If there was a constructive dismissal, was the dismissal unfair?
      20 i. Was the reason for the breach by the employer reasonable in all the circumstances?

75. It was submitted that the following legal principles applied:-

   a. It is an implied term of the contract of employment that a Respondent will not act, without reasonable and proper cause, in such a way as is 25 calculated or likely to seriously destroy or damage the Claimant's trust and confidence in the Respondent (*Malik v Bank of Credit & Commerce International SA* [1997] ICR 606).
   b. The burden of proving a breach of the implied term falls on the employee and, in particular, the burden is on the employee to prove

that the Respondent acted without reasonable and proper cause (*RDF Media Group plc & anor v Clements* [2008] IRLR 207, QBD).

c. A breach of this term will not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held. The test is to look at the circumstances objectively (*Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420).

76. Counsel for the Respondent summarised the conduct by which the Claimant alleges the Respondent breached the duty of trust and confidence:-

a. Suspending the Claimant
b. Imposing a final written warning
c. Failing to follow a fair disciplinary procedure
d. Appointing Colin Kerr as Senior Commercial Manager

77. In relation to the suspension of the Claimant, it was not in dispute that the Claimant failed to attend the meeting on 13 February 2019 and this was clearly a direct challenge to the authority of the managing director. In all the circumstances, the Claimant's suspension and the final written warning were imposed with reasonable and proper cause; the Claimant repeatedly refused to attend the meeting with no good cause and no reasonable employer would tolerate such behaviour. This was conduct which merited suspension pending a disciplinary procedure.

78. This was a case where little investigation was needed. The Claimant knew the allegations against him and was able to explain his action and put forward any mitigation at the investigation meeting. He had had advice and was aware of the company procedures so must have known the possible outcomes.

79. It was submitted that the Respondent was not contractually bound by the procedure in the company handbook. Given that the circumstances involved other directors, there was no-one other than Mr Brown to conduct the investigation and disciplinary hearing.

80. Mr Brown considered that the allegations in the Claimant's grievance require to be resolved before the appeal and that was a reasonable judgment.

81. The Claimant has not indicated what more he would have said had there been a separate disciplinary hearing which would have altered the final decision to impose a final warning. In particular, the Claimant's appeal did not put forward any new information and in the grievance hearing the Claimant did not put forward any further reason for not attending the 13 February meeting.

82. Any procedural failings were not deliberate. In any event, this is not a case of straightforward unfair dismissal where the Tribunal is considering the reasonableness of the procedure followed. The Claimant was given the opportunity to put forward his version of events, witnesses were interviewed and there was no suggestion that Mr Brown was not impartial.

83. The Claimant was a senior person in his department who was trusted with securing payments worth millions of pounds. It is entirely unacceptable that he repeatedly refused to attend a meeting with the managing director. The Respondent's actions in response to that were reasonable and proper; they did not amount to a breach of the implied term.

84. In relation to the appointment of Mr Kerr, the Respondent were under no obligation to consult the Claimant about this or seek his approval. The Respondent had genuine concerns about the volume of work for the Claimant's department and this was borne out by issues that emerged whilst Mr Caldwell was overseeing the department in the Claimant's absence.

85. The Respondent did not intend to replace the Claimant; the Claimant's work was to remain but with the addition of another role to take on part of the load. The Claimant was repeatedly informed that he was not being replaced and asked to return to the same role. The appointment of Mr Kerr was intended to support the Claimant.

86. It was submitted that the Claimant did not wait to find out if his role had changed or if he had been demoted. He simply assumed that he was but had no basis to do so; the information given to him was consistently that his role remained

unchanged. The Claimant resigned on the assumption that he had been demoted or replaced without waiting to find out.

87. The Respondent clearly had to have someone covering the Claimant's duties in his absence and now that he is no longer working for the Respondent. However, there was no intention to replace or demote him.

88. In relation to the reasons given in the Claimant's letter of resignation which pre-date February 2019, the Claimant had been asked why he did not resign in February 2019 and he replied that he had learned to live with robust challenges.

89. The Claimant was still engaged in the grievance process as at 3 April 2019 and wrote his letters of 4 April with no evidence lead as to when these were received. The Claimant resigned quickly after that in circumstances where the letters had not asked for a response and were expanding on the grievance.

90. Counsel for the Respondent submitted that it was not necessary for the Tribunal to find a reason for the Claimant's resignation, only to decide if the resignation was in response to any breach. He went on to submit that there were problems with the Claimant's work which were going to come to light and that the Claimant had issues with the appointments of Mr Brown and Mr Caldwell as directors. He clearly did not want to report to a senior commercial manager.

91. If the Tribunal finds that there was a dismissal then it was submitted that there was a fair reason for dismissal; the Respondent relied on "some other substantial reason" being the Claimant's refusal to obey a management request in relation to attending the meeting on 13 February 2019.

92. In relation to remedies, it was submitted that it would be just and equitable to reduce both basic award and compensatory award on the basis of the Claimant's contributory conduct in disobeying a management request with no plausible reasons for doing so.

93.

94. In response to the Schedule of Loss produced on the Claimant's behalf, Mr Edward made the following comments:-

    a. Evidence had not been led in relation to loss during the Claimant's evidence.
    b. No evidence of the extent of any loss beyond basic award.
    c. In relation to losses for the cost of the Claimant's business start-up, there had been no evidence or vouchings produced in relation to these.
    d. It was the Claimant who failed to allow the grievance to continue and so there should be no uplift for this.

Claimant's application to reopen the Claimant's case

95. In rebuttal of the submissions made about the lack of evidence and vouchings in support of the Schedule of Loss, Mr Pacey made an application to re-open the Claimant's case to produce such evidence:-

    a. The Respondent had made no objections about the evidence lead in relation to remedy during the hearing.
    b. The vouchings could be easily produced and evidence led from the Claimant about these issues.
    c. This would not involve any prejudice to the parties.

96. The application was opposed by the Respondent:-

    a. No cause was shown as to why the evidence was not produced earlier.
    b. Instructions may need to be taken from the Respondent and further investigations may be needed so it was not a simple matter of the Claimant speaking to matters.
    c. The Respondent accepted the salary details in the ET1 but the Schedule of Loss included projected pay increases and evidence would be required to address those.

97. The Tribunal took account of the overriding objective to deal with the case fairly and justly for both parties. It took into account the following factors:-

a. The case was listed for liability and remedy
b. Both parties are legally represented and have been throughout the proceedings.
c. The Claimant has not been prevented from leading evidence on his losses and did so giving details of salary and other benefits. Similarly, he gave evidence on mitigation.
d. The Respondent has agreed salary details in the ET1.
e. If it was the case that the Tribunal could not make any decision on remedies then there would be a prejudice to the Claimant.
f. But this is not such a case as there is evidence about loss.
g. There was no adequate explanation given why evidence was not led about the loss set out in the Claimant's Schedule of Loss.
h. It cannot be said that there would be no delay; the Respondent would be entitled to take instructions and it may be that they would wish to challenge any points with evidence of their own (for example, the projected pay rises).

98. For all these reasons, the application to re-open the Claimant's case was refused. The Schedule of Loss would be treated as submissions on behalf of the Claimant as to what award the Tribunal should make in the event the claim succeeds. The Tribunal will take account of submissions made on behalf of the Respondent in response to the Schedule of Loss and what evidence there is to support such submissions on loss.

Relevant Law

99. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98.

100. Section 95(1) of the 1996 Act states that dismissal can arise where:-

"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."

101. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

    a. There must be a fundamental breach of contract by the employer
    b. The employer's breach caused the employee to resign
    c. The employee did not delay too long before resigning thus affirming the contract

102. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

103. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

104. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd [1985] IRLR 465*. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

105. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

106. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a "last straw" case:-

"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*

(5) Did the employee resign in response (or partly in response) to that breach?"

Decision

107. The Tribunal has approached the case on the basis that the appropriate test for whether there has been a dismissal as defined in s95(1) of the 1996 Act is that laid down in *Western Excavating.* The Tribunal will address the three elements of that test in turn.

Was there a fundamental breach of contract by the respondent?

108. The Claimant seeks to argue that there had been a breach of the implied duty of trust and confidence arising from the conduct of the Respondent relying on the "last straw" principle.

109. The Tribunal was particularly anxious to identify what the "last straw" was in this case. This is particularly important when the question of whether the Claimant had affirmed the contract is considered but it is also significant to the question of whether there was a fundamental breach of the contract at all.

110. In response to questioning from the Tribunal, the Claimant could not identify any event between his letters of 4 April 2019 and his resignation letter of 9 April that prompted him to resign, let alone any particular act by the Respondent.

111. In his submissions, Mr Pacey advanced the case that it was the conduct of the grievance meeting on 3 April (particularly, the failure to explain the appointment of Mr Kerr in terms with which the Claimant was satisfied) followed by the lack of response to the Claimant's letters of 4 April 2019 that was the "last straw".

112. In the Tribunal's view, this was a case where, between the events of 3 and 4 April 2019 and his resignation on 9 April, the Claimant reached the conclusion that he could no longer continue to work for the Respondent but this was not a case where the Claimant was particularly reacting to something done by the Respondent in that intervening period.

113. The Tribunal did not find that any lack of response to the Claimant's letters of 4 April 2019 was capable of being the "last straw". The Claimant himself makes no mention of these letters at all in his letter of resignation and there was no evidence that the lack of an immediate response to these letters in anyway played a part in the Claimant's decision to resign.

114. Further, it cannot be said that a delay of as few as one to two working days (remembering that there was a weekend between the Claimant's letters of 4 April and his resignation of 9 April) would be sufficient to contribute to any breach of the duty of trust and confidence.

115. In these circumstances, the Tribunal found that, if there was a fundamental breach of contract, the "last straw" was what happened at the grievance hearing on 3 April 2019, in particular what was said around the appointment of Mr Kerr. It was quite clear from the Claimant's evidence and his letter of

resignation that it was the events of that date that lead him to conclude that the only option left to him was to resign.

116. Having determined that the "last straw" was what happened at the meeting on 3 April 2019, the Tribunal has gone on to consider whether the totality of the events leading up to and including that meeting was such that it was calculated or likely to destroy trust and confidence.

117. It was quite clear to the Tribunal that there were elements of the Respondent's conduct over the period leading up to the Claimant's resignation that did not do the Respondent any credit. The disciplinary process followed by the Respondent was hopelessly confused; the initial meeting was originally described as a disciplinary hearing, changed to an investigation meeting but effectively became the disciplinary hearing when Mr Brown did not hold any further meeting with the Claimant before issuing the final written warning. The Respondent certainly did not follow their own disciplinary procedure.

118. Similarly, although it was ultimately a decision for the Respondent as to whether to appoint a senior commercial manager, the complete failure to discuss this with the Claimant in advance was not something which the Tribunal considered to be good practice. It must be obvious to a reasonable employer that creating a new, senior post would have been of concern to an employee who had, up to that point, been the most senior employee in that department, particularly in circumstances when that employee had recently been subject to disciplinary action and was on sick leave. In such circumstances, a failure to even speak to the Claimant about the appointment of Mr Kerr, let alone explain to him how the new role would work with his job, is clearly unreasonable on the part of the Respondent.

119. Further, the Respondent had also indicated to the Claimant that some further investigation into him was to take place but no detail of that had been given. This in itself would be likely to undermine the Claimant's trust in his employer but when taken in the context of the appointment of Mr Kerr, the lack of any communication about either of these matters is entirely unreasonable.

120. However, the Tribunal reminded itself that the question to be determined is not whether the Respondent has acted reasonably or not but rather whether they have acted in a manner which amounts to a fundamental breach of contract (applying the *Malik* test).

121. On the other hand, it was equally clear to the Tribunal that the Respondent had proper and reasonable cause for a number of their actions throughout the period. The Respondent was entitled to instigate disciplinary action against the Claimant in circumstances where a senior employee had refused to attend a meeting with directors. Further, the Tribunal considered that the Respondent was entitled to reach a conclusion that the Claimant was guilty of misconduct and impose a sanction for that conduct.

122. Similarly, any criticism of the delay in hearing the Claimant's appeal is, in the Tribunal's view, unwarranted in circumstances where the Claimant himself had said that he could not attend the appeal until his subject access request was answered. There was, therefore, a proper and reasonable explanation for the delay in processing the appeal.

123. In relation to the appointment of Mr Kerr, the Respondent was clearly entitled to organise their business as they saw fit. They did have a proper and reasonable explanation for the need for this new role given their concerns about the workload of the commercial department and the issues that had arisen.

124. To be fair to the Claimant, the evidence he gave and the submissions made on his behalf did not seek to complain about the appointment *per se* but rather was focussed on two matters. First, the lack of consultation which the Tribunal has addressed above. Second, the Claimant's assumption that he had been replaced or demoted which arose from the lack of consultation or explanation.

125. However, it was quite clear that Mr Brown reassured the Claimant multiple times at the meeting on 3 April 2019 that he had not been replaced or demoted. The Claimant persisted in his assertions that he had despite these reassurances but, in the Tribunal's view, he had no basis to continue in these assumptions.

126. In particular, given that the Claimant did not return to work, there is no evidence to suggest that he had, in fact, been replaced or demoted. The Tribunal has no direct evidence as to how the commercial department would have worked if the Claimant had returned and it is not prepared to draw an inference from what has happened since the Claimant's resignation. In that regard, it is entirely unsurprising that Mr Kerr has picked up the work which would have otherwise been done by the Claimant.

127. There was a further submission made about the fact that the Claimant and Mr Pierce did not speak again after the events of 13 February 2019. However, the Tribunal considers that there was a proper and reasonable explanation for there being no contact given that they were both the principal actors in an ongoing disciplinary process and that the Claimant had raised a grievance about Mr Pierce. It is entirely unsurprising that a degree of separation was maintained between the Claimant and Mr Pierce in such circumstances.

128. The Tribunal agrees with the comment made by Mr Pacey that this is an unfortunate case where a successful working relationship fell apart. However, simply because a working relationship has fallen apart does not mean that this amounts to a constructive dismissal and the question for the Tribunal is whether the Respondent has acted in a manner calculated or likely to destroy trust and confidence.

129. The Tribunal did not find any evidence that this was a case where the Respondent deliberately set out to destroy the working relationship and this was not something which was particularly advanced on behalf of the Claimant. The Tribunal's focus has, therefore, been on the issue of whether the conduct of the Respondent was "likely' to destroy trust and confidence.

130. Despite there being certain matters set out above which the Tribunal considered did not reflect well on the Respondent, the Tribunal does not consider, when taking matters as a whole, the Respondent, without proper and reasonable cause, acted in a manner likely to destroy trust and confidence.

131. The Tribunal has already set out its view that a number of the matters about which the Claimant complains are ones for which the Respondent has a proper and reasonable explanation. In relation to those matters for which the Tribunal has criticised the Respondent, the Tribunal does not consider those to be sufficient to destroy trust and confidence.

Did the Respondent's breach cause the Claimant to resign?

132. On the face of it, the Claimant quite clearly resigned as a result of the matters set out in his letter of resignation; this letter expressly, unambiguously and unequivocally sets out the reason why he resigned.

133. If that were the only issue to be considered in relation to this element of the *Western Excavating* test then the Tribunal would have no hesitation in holding that the Claimant resigned as a result of the matters set out in his letter of resignation.

134. However, the Respondent has raised a number of points to the effect that the reason given for the Claimant's resignation was not the true reason for his resignation and these require to be addressed.

135. The Respondent has sought to suggest that the Claimant was unhappy with the appointment of Mr Caldwell and Mr Brown as directors and that this was the true reason for his resignation. In the alternative, that the Claimant was seeking to avoid scrutiny (and further, possible disciplinary action) in relation to various matters that had arisen after his suspension.

136. However, there is nothing in the factual matrix that suggests that the Claimant had any reason to leave his employment with the Respondent for any reason other than those given in his resignation letter. The appointment of Mr Brown and Mr Caldwell had taken place sometime prior to the Claimant's resignation and there was nothing to suggest that this was a factor in his decision to resign.

137. Similarly, there was no evidence to suggest that the matters which had arisen (as narrated in the ET3) were in the knowledge of the Claimant. He was told that there was a further investigation but absolutely no detail of what that was about had been given.

138. In the circumstances of this case, the Claimant has given very clear reasons why he resigned and there is nothing to suggest that there was some other reason for this.

139. The Tribunal, therefore, concludes that the Claimant had resigned for the reasons set out in his letter of resignation and, had those reasons amounted to a fundamental breach of contract, the Tribunal would have found that the Claimant resigned as a result of that.

Did the Claimant affirm the contract?

140. It was quite clear to the Tribunal that the Claimant had sought to engage with the Respondent's internal processes in relation to the various matters which he now says amount to a breach of trust and confidence; he appealed the decision to impose a final written warning; he raised a grievance about the conduct of Mr Pierce; he sought to add the issue of Mr Kerr's appointment to his grievance.

141. In these circumstances, the Tribunal was of the view that, up to 3 April 2019, the Claimant had waived any potential breach and affirmed the contract by his actions (that is, engaging in the internal processes described above).

142. However, it was equally clear to the Tribunal that, immediately after the grievance meeting of 3 April, the Claimant continued to engage in the internal process by sending the letters of 4 April 2019 setting out further details and clarification of his grievance. Viewed objectively, the Claimant's actions were those of an employee who was continuing to seek a resolution to his grievance through his employer's internal processes, particularly where the Claimant's grievance was ongoing and no decision had been made in relation to it.

143. There was nothing which happened between those letters and the Claimant's resignation on 9 April 2019 which could be said to be a "last straw" triggering the Claimant's resignation. As set out above, the short delay between the letters of 4 April and the Claimant's resignation is not such that the Tribunal would consider being capable of contributing to any loss of trust and confidence.

144. For these reasons, the Tribunal considers that, even if there had been a breach of the duty of trust and confidence as at 3 April 2019, the Claimant had affirmed the contract by his actions in continuing to engage in the Respondent's internal procedures.

5 *Conclusion – was there a dismissal?*

145. The Tribunal considers that there was not a dismissal as defined in s95(1)(c) of the 1996 because there had not been a fundamental breach of contract and, if there had, the Claimant had affirmed the contract by his actions in continuing to engage with the Respondent's internal processes

10 *Was the dismissal fair?*

146. Given the Tribunal's findings in relation to whether or not the Claimant was dismissed, the Tribunal did not find it necessary to address the issue of whether any dismissal was fair.

15 Employment Judge: P O'Donnell
Date of Judgement: 17 December 2019

Entered in Register,
Copied to Parties: 18 December 2019

20