EMPLOYMENT TRIBUNALS

Claimant **Mr Lee Merritt**

Respondent **Playfords Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE **ON 6 March 2020**

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances

Claimant in person

For Respondent Mr Alan Tuohy, Managing Director

JUDGMENT

The claim of unfair dismissal is well founded. I award compensation of £4523.25, being a basic award, reduced by 50%, only. The Recoupment Regulations do not apply.

REASONS

1. Introduction and Issues

1.1. By a claim presented on 10 August 2019 the claimant, born 14 August 1970, brought a claim of constructive unfair dismissal. He was employed from January 2004 as a Senior Data Engineer and resigned on 2 August 2019. He was paid £489 gross per week . He started a new job on 5 August paid very slightly less.

1.2. The issues broadly framed are: -

1.2.1. Did the respondent breach any express or implied terms of the claimant's employment contract, in particular by demanding payment which it had no contractual right to do and/or in breach of Part 2 of the Employment Rights Act 1996 (the Act) ?

1.2.2. Were such breaches fundamental in themselves?

1.2.3. Were the actions of the respondent without reasonable and proper cause, separately or cumulatively calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant?

1.2.3. Did the claimant resign, at least in part, in response to such breach without first affirming the contract?

1.2.4. If so, there was a dismissal , does the respondent show a potentially fair reason for it ?

1.2.5. If so, was the dismissal fair applying the test in s 98(4) of the Act

1.2.6. What remedy should be awarded?

2.The Relevant Law

2.1. Section 95(1)(c) of the Act provides an employee is dismissed if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is* ***entitled to*** *terminate it without notice by reason of the employer's conduct*." An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract Western Excavating (ECC) Ltd v Sharpe 1978 IRLR 27. The conduct must be more than just unreasonable to constitute a fundamental breach.

2.2. Section 98 (1) requires the respondent to show a fair reason for dismissal which in a constructive dismissal case was explained in Berriman v Delabole Slate Company 1985 ICR 546 as *"requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer*."

2.3. In order to identify a breach, it is necessary to establish what the terms of the contract are. Contractual terms may be either express or implied. Express terms are those specifically agreed between the parties, whether in writing or under an oral agreement. They may be vague or incomplete and need to be supplemented by implied terms. Only in rare circumstances, eg where a term is implied by statute, may an implied term contradict an express one.

2.4. A breach may be actual or anticipatory. An actual breach arises when the employer refuses or fails to carry out an obligation imposed by the contract at a time when performance is due. An anticipatory breach arises when, before then, the employer intimates to the employee, by words or conduct, he does not intend to honour an essential term of the contract.

2.5. In Financial Techniques (Planning Services) Ltd v Hughes 1981 IRLR 32, the Court of Appeal held when there is a genuine dispute about the terms of a contract it is not an anticipatory breach for one party to do no more than argue its point of view. Lord Justice Templeman said this did not mean an employer could invariably insist on a plausible but mistaken view of his contractual obligations without being held to have repudiated the contract. In Bridgen v Lancashire County Council 1987 IRLR 58, Donaldson MR said "*The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that* ***he did not intend to be bound by the contract as properly construed.***'

2.6. Once a breach (actual or anticipatory) has occurred, I must consider whether the breach is fundamental. This is a question of fact and degree. The employer's motive for the conduct is irrelevant In Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, a sales director, was demoted in status and moved into a cramped unventilated office. The employer argued economic circumstances impelled it to treat him in this way, but the EAT stressed the test of fundamental breach is a purely contractual one and the surrounding circumstances are not relevant, at this stage . They will be to the reason for the dismissal .

2.7. The obligation on an employer to pay the correct wages is so fundamental that breaches of this duty are likely to be treated as repudiatory. Part 2 of the Act is entitled " Protection of Wages". It makes unauthorised deductions from wages unlawful and that is something out of which the parties cannot contract by virtue of s203 . It also includes

15 Right not to have to make payments to employer

(1) An employer shall not receive a payment from a worker employed by him unless—

(a) the payment 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 payment.

(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 receiving the payment 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) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the variation took effect.

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

(5) Any reference in this Part to an employer receiving a payment from a worker employed by him is a reference to his receiving such a payment in his capacity as the worker's employer.

2.8. Where the employer has not breached any express or other implied term , an employee may rely on the implied term of mutual trust and confidence. In Woods v WM Car Services Ltd 1981 IRLR 347, the EAT, said: -

"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

2.9. The House of Lords considered the implied term of mutual trust in confidence in Malik v BCCI and emphasized whether the conduct of the employer was without "reasonable and proper cause" must be objectively decided by the Tribunal. It cannot be enough the employer thinks it had reasonable and proper cause, Bournemouth University v Buckland 2010 ICR 908

2.10. An employer is liable for acts of managers towards subordinates in the course of employment whether it knew or approved of them or not. Hilton International v Protopapa.

2.11. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period of time, as said in Lewis v Motorworld Garages 1985 IRLR 465: -
"*In considering whether the respondent has breached the implied term of mutual trust in confidence, the Tribunal had erred in excluding consideration of two earlier breaches of express terms of the contract on the grounds that the employee had accepted the altered terms of the contract. Even if an employer does not treat a breach of that express contractual term as wrongful repudiation, he is entitled to add such breaches to other actions, which taken together may cumulatively amount to a breach of the implied obligation of trust in confidence."*
As Lord Justice Donaldson said, the earlier breaches are not "spent". This so called " last straw doctrine", was further explored in London Borough of Waltham Forest v Omilaju 2005 IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. What it adds to the breach may be relatively insignificant, though an entirely innocuous act on the part of the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer.

2.12. Resignation is acceptance by the employee the breach has ended the contract. Conversely, he may expressly or impliedly affirm the contract. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook 1981 IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport 2002 IRLR 472, but I will in this case give the shorter, but effective explanation in Cantor Fitzgerald v Bird 2002 IRLR 267, that affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

2.13. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13

2.14. There are other remedies for unfair dismissal but the claimant asks only for compensation . That comprises two elements (a) the basic award set out in s 122 is an arithmetic calculation based on age and length of service which in this case is 18.5 "week's pay" which can be reduced under s122(2) where the tribunal considers any conduct of the employee before dismissal makes it just and equitable to do so and (b) the compensatory award defined in section 123 which includes
(1) ... such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ..

3 Findings of Fact

3.1. I heard the claimant Mr Lee Geoffrey Merritt, and for the respondent Mr James Tuohy Commercial Director; Ms Bronwen Elizabeth Chamberlain HR Manager ; and Mr David Bryan Miller, Northern Operations Director. Ms Chamberlain had prepared a concise relevant document bundle . The main facts are not in dispute.

3.2. The claimant always had use of a company van, doing some 30000 miles a year as part of the job. He was not permitted to use it for private purposes, and did not, but took it home at night, which gave him the benefit of having to leave not quite so early to get to a job. Unbeknown to him the spare wheel, which is held in by a secure device underneath the vehicle, was stolen. He does not know where from or when. It could have been outside his home or a hotel when working away or anywhere it was parked.

3.3. He approached Mr Miller some time in May when he realised the theft had occurred. The company has a Driver Authorisation Form which provides information on the use and upkeep of company vehicles. Part of the requirement is to report any damage to the vehicle. Mr Miller told the claimant he needed to provide a report as to how this had happened which would then have been reviewed to establish if the employee had any responsibility for the incident. He adds the claimant had cut off a security cable on a hire van a few years ago, which the respondent replaced for him at no charge, but when he reported the spare wheel had been stolen this time Mr Miller said he would probably have to pay for it himself. He says the claimant agreed to this and Mr Miller said instead of going through Ford/Lease company it would probably be cheaper if he procured one himself. Mr Miller says in his statement “company policy” is that damage caused to a vehicle which is the responsibility of the driver (not a third party) needs to be reimbursed to the company up to the value of the insurance excess.

3.4. Ms Gill Smith , an administrator in the Durham office, located a wheel locally for £80. Mr Miller asked the claimant if the wheel had been replaced and he said no and he was not now going to pay for it. When asked why he said after speaking to colleagues/family it was not his responsibility. Mr Miller replied the van was his responsibility. The claimant says he was given an ultimatum to pay for the wheel within a week or be taken to court. Mr Miller denies that ultimatum but agrees he then said he needed to speak to the directors. When I asked Mr Miller about this one conflict of evidence, he replied he would not have threatened court action, he would just have deducted the cost from the claimant’s wages , which would have been plainly illegal . Ms Chamberlain agreed there is nothing in any documentation which comes close to a written authority to make deductions from wages or receive payments from employees

3.5. After discussions with fellow directors, it was decided the respondent had no choice but to pay for the wheel as the claimant was now driving the van illegally without a spare wheel. Mr Miller says the claimant , when told the respondent was now going to pay for the wheel, *smirked*. Mr Miller stated the van would now be kept at company premises as a spare as the claimant would be working with Mark Thompson on a site in Darlington and the van would not be replaced when its lease expired in September. The claimant did not take this news well a few strong words (from both sides) were exchanged over the matter.

3.6. In very illuminating email exchanges between the claimant and Ms Chamberlain, from 8-12 June, she says the company would not take the claimant to court but neither she nor any other director ever said Mr Miller had been in the wrong or that such an instance would not happen again. The claimant says he was then not spoken to for some weeks by Mr Miller but told by another employee no vehicle was allowed at his home anymore. He later was told the company were reducing the van fleet and he had lost use of a vehicle. He felt it was because he had not paid for the wheel that he had lost the use of the van. Having worked for the respondent for over 15 years he felt unfairly treated. He looked for other employment not because he wanted to leave a job he was happy with but because due to Mr Miller's conduct felt he had no choice

3.7. He handed in his notice on 25 July. On 29 July Mr James Tuohy came to see him and apologised for the way things had been handled after all his years service as a good employee.

3.8. Mr Miller says when the van was returned, not only was the wheel missing, but a part of the bumper was gone and the locks were broken. The claimant accepts the bumper was damaged but not by him. Mr Miller said today he thought the van came to harm when kept where the claimant lived. He adds *We were keen to maintain the services of Mr Merritt who was a long standing member of the company, highly respected and valued. He had worked on some very prestigious projects for the company and is a great loss to the company thus the attempts by our directors to persuade him to change his mind and stay with the company.*

4. Conclusions

4.1. I found the claimant's evidence was credible but some of his views wrong. I fully accepted the assertions of the respondent the decision to reduce the van fleet had nothing to do with the claimant's refusal to pay for the wheel. I also accept Ms Chamberlain, Mr Alan Tuohy and Mr James Tuohy did everything they could to get the claimant to mediate with Mr Miller

4.2. However, what Mr Miller did and said the claimant reasonably thought may happen again. It was clearly a fundamental breach of the express terms of the claimant's contract and of Part 2 of the Act. The claimant alleges other acts which separately or cumulatively amount to a fundamental breach of the implied term of mutual trust and confidence and though he took some acts the wrong way I see that too . Applying Lewis -v- Motorworld Garages, the failure by the respondent to accept Mr Miller was wrong was a valid last straw. He delayed in resigning only to the extent necessary to keep earning a living and had never affirmed the earlier breach .

4.3. However, although the respondent cannot undo the breaches , I consider the claimant's refusal to engage in mediation merits a reduction of 50% in his basic award and it is not just and equitable to make even a small compensatory award

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 6 MARCH 2020