



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

Mr M Bowrey

AND

**Respondent**

Belgrave Commercials Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Plymouth

**ON**

13 July 2020

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person

**For the Respondent:** Mr C Johnson, Consultant

### JUDGMENT

**The judgment of the tribunal is that the claimant resigned his employment, and his unfair dismissal claim is dismissed; and the claimant is not entitled to a statutory redundancy payment.**

### RESERVED REASONS

1. In this case the claimant Mr Mike Bowrey claims that he has been unfairly constructively dismissed, and that he is entitled to a statutory redundancy payment. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable, and entitlement to a redundancy payment does not arise.

2. I have heard from the claimant. I have heard from Mr P May and Mrs G May (who are the proprietors of the respondent's business), and from Mr S Baker their Sales Manager, on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company is in business in Plymouth as a retailer of commercial vehicles. The claimant was employed as a Sales Executive from 1 December 2008 until his resignation which took effect on 16 May 2019. The claimant had a written contract of employment which included written disciplinary and grievance procedures. The key events during the claimant's employment leading up to his resignation are as follows.
5. The claimant faced disciplinary proceedings for dishonesty in January 2017, following the sale for his personal advantage of a vehicle traded in to the respondent's business by way of part exchange. The claimant apologised for his actions and was issued with a final written warning which he did not appeal.
6. Just over one year later towards the end of January 2018 the claimant faced further disciplinary proceedings for gross misconduct in respect of the theft of company property. CCTV footage had revealed that he had taken oil from the respondent's premises for his own use without authority. The claimant apologised and offered to pay for the oil. He was then issued with a second final written warning, which again he did not appeal.
7. Subsequently in 2018 there were discussions between the parties as to whether the claimant might be made redundant. It seems the terms were not agreed between them, but in any event the claimant was not dismissed at that time by reason of redundancy, and continued in the respondent's employment.
8. In May 2019 the claimant again faced further allegations of gross misconduct relating to the theft of company property. This followed CCTV footage which indicated that the claimant had removed a set of wheel trims in a black bag for his own use. Whilst this was being investigated the respondent had further concerns about the claimant's conduct in connection with another vehicle traded in as part exchange. The respondent suspected that the claimant had discounted a sale to a customer to include the part exchange vehicle, which the claimant had not declared and had then retained for his own use.
9. By letter dated 15 May 2019 the claimant was suspended on full pay and called to a disciplinary hearing to face these further allegations. That letter was sent by recorded delivery, but also delivered by hand to the claimant on 16 May 2019 by Mr Baker the respondent's Sales Manager. The claimant then decided to resign his employment and gave Mr Baker his written resignation dated 15 May 2019, although this date was incorrect because the meeting between the claimant and Mr Baker was on 16 May 2019. The letter simply read: "to Paul May: this is my resignation with immediate effect - signed M Bowrey". The letter was also signed as having been witnessed by Mr Baker.
10. The respondent acknowledged the claimant's resignation by letter to the claimant dated 17 May 2019, but it also offered the claimant a cooling off period and the opportunity to reconsider and to retract his resignation if this been given in haste. The claimant chose not to do so, and his resignation was accepted. Some two months later the claimant suggested that he might wish to retract his resignation, but the respondent declined to do so at that stage.

11. The claimant wrote a letter to Mr P May dated 2 July 2019 in which he set out a number of allegations by which he criticised the conduct and behaviour of the respondent and which he alleges led to a “corrosive and soul destroying” environment which led him with no option other than to resign. The claimant relies upon these allegations today, and the more significant allegations are now addressed as follows.
12. The claimant complains that from January 2017 he was unable to use the men’s toilet in the workshop. I find that following complaints from its mechanics, the respondent required the claimant not to access the workshop on a Saturday afternoon when the mechanics were not present, and accordingly the workshop was locked. This left the claimant with access to a separate ladies’ toilet which he was entitled use on these Saturday afternoons only when there were no female staff at work. The respondent had reasonable cause for this instruction.
13. The claimant complains from January 2017 he was subject to scrutiny under the respondent’s CCTV system. I find that there was a CCTV the system in place throughout the entirety of the claimant’s employment, which was upgraded in January 2017. The claimant was well aware that CCTV was in place, and indeed had asked for it to be used on one occasion to his advantage after a customer had acted unreasonably towards him. I find that the respondent had reasonable and proper cause to maintain and review its CCTV system, particularly given the gross misconduct which the claimant had admitted and which had led to his two final written warnings. This included an incident in February 2018 when the claimant was challenged for taking two rivets. Although he felt that he was being “spied upon” it was another example of the claimant taking the respondent’s property without authority, although this would seem to be a minor matter and the respondent chose to take no further action.
14. The claimant complains that in early 2018 Mr May complained that he dressed like he “owned the business” which he found offensive. I prefer Mr May’s evidence to the effect that he was happy for the claimant to dress professionally, and on one occasion he even purchased the claimant a pair trousers or a suit for that reason.
15. The claimant complains that he was also gradually given fewer sales opportunities. However, I accept Mr May’s evidence that the statistics show that the claimant actually increased the amount of sales which he had completed as a percentage of the total sales by the respondent. It increased from 50% in April 2017 to 57% in June 2018. In addition, the claimant did not unfairly lose out on finance backed sales which give rise to higher commission because the respondent’s amount of finance backed sales remain consistent during this period.
16. The respondent also introduced a new computerised holiday booking system for staff, for which the claimant seems to have objected. Historically he had agreed holidays with Mr May directly, so that their absence on holiday did not clash. The new scheme required all employees to book their holidays through this new system instead. I do not accept that the claimant was disadvantaged or denied appropriate holiday by this new system, which the respondent had reasonable cause to introduce, and which applied to all staff. The claimant did raise an informal grievance about using the new system, and what Saturday afternoons he might have off, but this seems to have been resolved satisfactorily during 2018.
17. Another complaint raised by the claimant is that Mr May took offence at his personal diary, which the claimant was keeping at work as a history of unacceptable behaviour by the respondent. I prefer Mr May’s version of events to the effect that the diary in question was not the claimant’s personal diary, but was a diary owned and maintained by the respondent to keep a record of customers’

- names and addresses and contact details so that sales enquiries could be properly recorded and pursued. Mr May merely asked the claimant to ensure that the diary was not left open on the desk in front of other customers because their personal data was on display.
18. The claimant has not established, and I do not find, that there was any alleged course of unacceptable behaviour by the respondent aimed at the claimant. The claimant has adduced a letter from his GP to the effect that he was suffering from anxiety and stress which were linked to his position at work. This covers the period when the claimant faced possible dismissal for theft of company property on two occasions over 13 months. The claimant has not established, and I do not find, that there was any alleged course of unacceptable behaviour by the respondent aimed at the claimant, and which in effect forced him to resign.
  19. I find that the claimant's resignation occurred as a direct reaction to his suspension and requirement to face further disciplinary proceedings for gross misconduct. He was offered the opportunity to retract his resignation, but chose not to do so at that time.
  20. Having established the above facts, I now apply the law.
  21. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.
  22. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
  23. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT.
  24. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
  25. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any

- further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
26. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
  27. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.
  28. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
  29. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason,

- both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”
30. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
  31. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
  32. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
  33. In this case I cannot find that the respondent acted in fundamental breach of contract. The burden of proof is on the claimant to establish the same, and he has not done so. There was no course of conduct which can be said to have been either calculated or likely to destroy or seriously damage the trust and confidence between the parties. The claimant’s resignation was consequential upon his suspension and requirement to face disciplinary proceedings for gross misconduct, which given the new evidence before the respondent and the claimant’s past employment record, was clearly something the respondent had reasonable and proper cause to do.
  34. In the absence of any fundamental breach of contract the claimant’s resignation cannot be construed to be his dismissal. I find that the claimant resigned his employment and was not dismissed. In the absence of any dismissal, his unfair dismissal claim must be dismissed. In addition, given that the claimant was not dismissed by reason of redundancy, he is not entitled to a statutory redundancy payment as claimed.
  35. Accordingly, both of the claimant’s claims are hereby dismissed.
  36. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 19; a concise identification of the relevant law is at paragraphs 21 to 32; and how that law has been applied to those findings in order to decide the issues is at paragraphs 33 to

Employment Judge N J Roper

Dated 13 July 2020

Judgment sent to parties on 14 July 2020

FOR THE TRIBUNAL OFFICE