



EMPLOYMENT TRIBUNALS

Claimant: John Konteng

Respondent: Interserve (Facilities Management) Ltd

Heard by CVP

On: 21- 23 September 2020 and 24 September in chambers

Before:

Representation

Claimant: Mr Offormezie - Solicitor

Respondent: Ms Wheeler - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims are dismissed.

RESERVED REASONS

1. The Claimant has claimed constructive unfair dismissal and race discrimination. The issues arise out of disciplinary action taken against the Claimant. The Respondent defended all claims.
2. The Tribunal heard from the Claimant and for the Respondent from Mark Carey, Hazel Murray, Paul Pascoe, Paul Rutherford. It had an electronic bundle numbered to 166. Both parties provided written submissions. In the Claimant's submissions reference was made to indirect race discrimination. The Claimant was advised by the Tribunal that there was not a claim of indirect discrimination before it. The hearing was held by CVP due to Covid-19.

3. A claim for constructive unfair dismissal requires a Claimant to show that there was a breach of contract and that it was sufficiently serious to justify his resignation or that he resigned in response to the last of a series of incidents. The Claimant must have left in response to that breach and must not have delayed his resignation.
4. The Claimant has claimed direct race discrimination. Section 13 of the Equality Act 2010 (“the EqA”) provides: “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
5. Under section 9 of the EqA: (as relevant to the issues in this case)
 - “(1) Race includes—
 - (a) colour;
 - (b)
 - (2) In relation to the protected characteristic of race—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
 - (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.
6. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).
7. The Claimant claims constructive unfair dismissal. The issues as set out in the case management order identify the precise matters that the Claimant relies on as being a breach of the implied term of mutual trust and confidence. They are:

Constructive unfair dismissal

- a. Was the Claimant dismissed. ie. (a) did the respondent breach the so-called ‘trust and confidence term’, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the Claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation — it need not be the reason for the resignation)? If the Claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.
- b. The conduct the claimant relies on as breaching the trust and confidence term is:

- i. on 7 January 2019, Hazel Murray visiting the store unannounced in order to target the Claimant.
- ii. Hazel Murray failing to deal with the claimant's complaint about being stopped and searched in the store and feeling that he was being targeted.
- iii. Hazel Murray instituting disciplinary proceedings against the Claimant.
- iv. Hazel Murray producing, in the course of the disciplinary proceedings, a witness statement saying that the claimant had been verbally abusive towards her.
- v. A written warning being issued against the claimant.
- vi. The claimant's appeal against the written warning being dismissed.
- vii. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4) and, in particular, did the respondent in all respects act within the so- called 'band of reasonable responses'?

Equality Act 2010, section 13: direct discrimination because of race

- i. Has the respondent subjected the claimant to the treatment set out at paragraph (ii) above?
- ii. Was that treatment "less favourable treatment", Le. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.
- iii. If so, was this because of the claimant's race? The claimant believes he was treated less favourably because he is black. He was the only black manager in the store.

The Tribunal's findings of fact

8. The Tribunal has made these findings of fact on the balance of probabilities having heard the evidence and considered the submissions. These finding are confined to those that relate to the issues as set out above, and are necessary to explain the decision reached.

9. The Claimant was employed by the Respondent from 1 April 2016 to 28 May 2019 as Instore Manager. Until the matters in this claim he had no previous disciplinary action against him.
10. The Respondent provides cleaning services to Sainsburys Supermarket (amongst other clients) and the Claimant worked at the Tunbridge Wells Store ("the store"). As a manager he was responsible for ensuring staff signed in and out. Sainsburys have a fingerprint system to sign in and out, and there is a book at customer services specific to the Respondent where all cleaners are required to sign in and sign out. This is used as proof of hours worked and the basis of time sheets and the bill to Sainsburys.
11. The Claimant is an hourly paid employee. The Respondent bills Sainsburys for the actual hours' cleaners work as evidenced from their sign in and sign out sheets and the electronic fingerprint records.
12. Sainsburys, in line with other retailers have a policy whereby they search their staff and contractors on a random basis. This is common in the retail sector. The Claimant's complaint is that Sainsburys managers initiated frequent searches of him during December 2018 and January 2019, which he says was discriminatory as he was the only black manager at the time. He was asked if other cleaners who were also black were searched and he said that he asked other contractors whether they were searched at other stores. He also told us there was one other black member of staff who worked nights at Tunbridge Wells. The searches are not done by the Respondent but by Sainsbury's and as such the Respondent cannot be held liable for how it applied it's policies. Mr Pascoe who heard the appeal said that when the Claimant told him of this, he tried to investigate by asking Sainsbury's for information about its policies and how the policy was implemented but got no information save for a copy of the policy itself.
13. Ms Murray is an Area Manager who took over management of the cleaning contract for the store when the previous manager Mr Shuttleworth left. She attended the store on two occasions relevant to these proceedings. On 7 January 2020 she attended unannounced. This is something that area managers do on a frequent basis. Her evidence is that she was delivering or collecting the time sheets so that payroll could be notified of hours staff had worked and was collecting this from many different stores. Her evidence is that she visited the stores in quick succession over a couple of days to get this information and all visits were unannounced. The Tribunal accepts that she is not obliged to announce when she is visiting a store.
14. The Claimant is the person who she needed to see. When she arrived, she used the electronic system to sign in. The Claimant had not signed in and she could not find him whilst she was on site although it is the Claimant's case that on site but not in the store and had not yet signed in on the paper system and that the electronic system was not working that day.
15. Ms Murray left Tunbridge Wells at 06:36 and went to the next store on her list and telephoned the Claimant who did not answer. He later rang her back.

Ms Murray says that the Claimant was aggressive The Claimant denies he acted in that way.

16. Ms Murray considered that the Claimant's behaviour was unacceptable, and she therefore wrote an email that day to her manager. Ms Shelley Morgan who accompanied her also wrote a short statement.
17. The events of 7 January 2019 led to an investigation being set up by Ms Murray's line manager Mr Ansel, with the Claimant being placed on precautionary suspension with pay during this process. The issues for investigation were set out in a letter to the Claimant dated 6 February 2019 the allegation being "*Dishonesty; falsification of documentation*". The details of this were also set out as follows:

"Specifically, it was advised to the manager by other staff members on 7th January 2019 that no cleaner was present in store and the store floor had not been swept or machined as there were spillages and wastage visible. When questioned about it you advised you were in store at 06:00am but the tablet wasn't working so you were unable to sign in, however the Area Manager had been able to use the tablet at 06:15am on the same day and could not locate you on site. In addition to this, you provided an incorrect wage sheet".

18. The investigation was conducted by Mr Rutherford who had no previous dealings with the Claimant. During the investigation issues relating to 20 January 2019 emerged which were also investigated by Mr Rutherford. This issue was that the Claimant had attended work for about 30-40 minutes, had not signed out and had claimed for 12 hours work. The Claimant accepted he had not worked a 12-hour shift and had left work after 30-40 minutes to attend his daughter's confirmation in London. Mr Rutherford considered that the allegations should proceed to a disciplinary hearing. It was Mr Rutherford rather than Ms Murray to initiated the disciplinary hearing.
19. On 25 February 2019, the Claimant was invited to a disciplinary hearing on 27 February 2019 which was later changed to 20 March 2019. The invitation letter repeated the allegation as set out in the invitation to the investigation and added this:

"On Sunday 20th January 2019 you had requested the day off as annual leave, and a cover cleaner was brought in. You came in for approximately 35 to 45 minutes signing in at 4.00 pm. You then claimed for 12 hours work on this day."

20. The Claimant was given the right to be accompanied. However, he chose to attend the hearing without a representative. The invitation to the disciplinary hearing enclosed all the four statements taken and used at the hearing, the investigation meeting notes and the Daily Attendance Records and Weekly Wage Hours Record for w/c 06/01/2019 and 20/01/2019. The Tribunal is satisfied that the Claimant had these documents in advance of the hearing and had not been handed them during the hearing as he alleged in cross

examination of Mr Carey who conducted the hearing. The Claimant was informed that the allegations constitute Gross Misconduct under the Respondent's disciplinary policy and that this may result in his dismissal.

21. Mr Bright (who provided a witness statement on behalf of the Claimant but who did not attend to give evidence), took notes which the Tribunal were taken to and read carefully. The Tribunal is satisfied that the Claimant was given the opportunity to say what he wanted to say. The notes, which the Claimant signed as being a fair reflection of the hearing do not show the Claimant raising any issue about discrimination. Mr Carey listened to what the Claimant had to say which included matters he raised during the investigation that Mr JS had agreed with him that he would be paid for 12-hour shifts whether or not he worked 12 hours. JS was not able to be contacted as he had left the Respondent in what was described as difficult circumstances. He did not leave an email or telephone number. The Respondent did not try to write to him. There was no record of any such agreement although the pay records show the 12-hour shifts being paid. The Claimant's argument was that even if he was not at work, he was on call which was required as the Respondent was short staffed in this store.
22. Mr Carey did not consider he had sufficient evidence of Ms Murray's complaint that the Claimant had been rude and aggressive to her. It was one person's word against another, so he did not proceed with this allegation. Similarly, he considered that the investigation into the allegation surrounding 7 January 2019 should also be dismissed as again there was no evidence as Mr Shuttleworth was unable to be contacted and he thought that the investigation itself was not properly completed.
23. He did however find the part of the allegation surrounding 20 January 2019 to be proved and gave the Claimant a written warning. This was a warning that stayed on the Claimant's record for six months. It was not a final written warning as suggested by the Claimant's representative.
24. In addition, the sign in sheets show the Claimant signing in when he got to work but did not show him signing out. It was explained to the Tribunal that this is very important for health and safety reasons as it is this document that the Respondent would rely on in case of an evacuation to establish who was in the building and who might be missing. The Claimant being a manager was expected to lead on this, but he failed to sign out. Notwithstanding the finding of falsification of documents (i.e. completing documents incorrectly). Mr Carey decided to give the Claimant the benefit of the doubt and rather than dismiss him, which was provided for in the disciplinary process gave a written warning.
25. The Claimant appealed. The appeal was heard by Mr Pascoe. Mr Pascoe is a very experienced manager who has worked for over 20 years in the industry. Mr Pascoe's evidence was compelling. Many of the matters on which Mr Pascoe was cross examined on were not in fact related to the decision made by Mr Carey to give a warning to the Claimant. The Claimant did not seem to appreciate that the only reason for the warning was because

he had failed to correctly sign in and out. He had confirmed he knew the process and the importance of it for health and safety reasons. The Tribunal finds that the Claimant was not given a warning in relation to the hours he claimed for payment, and this was because Mr Carey could not get hold of Mr Shuttleworth to confirm or otherwise, the agreement the Claimant said he had with him. Mr Pascoe emphasised in his evidence the health and safety risks of not signing out on the sign out sheet. He considered the sanction of a written warning to be appropriate. He dismissed the Claimant's appeal by letter dated 16 May 2019.

26. The Claimant resigned on 28 May 2019. In his resignation letter he said:

"Dear Paul

I am writing to inform you that I am resigning from my position of Interserve In-Store Manager with immediate effect.

I feel that I am left with no choice but to resign in light of my recent experiences at work and the resulting disciplinary hearing and subsequent appeal meeting.

Although I had provided you with evidence to explain the accusations brought against me by my line manager, I felt that this evidence was ignored and my honesty continued to be questioned.

The resulting decision that I was given a written warning in spite of there being no wrongdoing on my part, was, I believe unfair and discriminatory.

Since the disciplinary meetings I have been suffering from stress. So much so, that I am apprehensive about returning to the environment in which I was being singled out for humiliating and unwarranted body searches; and suffered harassment for carrying out staffing procedures which had been custom and practice under my previous line manager Jason Shuttleworth.

In view of this I have lost all trust and confidence in the management of Interserve.

Please accept this as my formal letter of resignation, and note that I regard this resignation as a constructive dismissal".

27. The Claimant's resignation was acknowledged on 30 May 2019. This letter asked the Claimant to reconsider his resignation and detailed the history of the matter complained of explaining that the Respondent had given the Claimant the lowest form of sanction available because mitigating circumstances were considered. The Respondent wanted an opportunity to discuss matters further with the Claimant and to investigate the matters raised in his letter of resignation by 6 June 2019 after which his resignation would be accepted. The Claimant was given the opportunity to retract his resignation. The Claimant did not do so.

The Tribunal's conclusions

28. The Tribunal has come to the following conclusions having found the factual matrix above. These conclusions are arrived at on the balance of

probabilities. All the evidence was heard and considered even if it is not specifically mentioned.

29. The Respondent's submissions made much of the Claimant's changing position in evidence for example, e.g. in cross examination, he stated that he returned to work on 20 January despite being in London for his daughter's confirmation whereas during the investigation process he wrote to Mr Rutherford categorically saying he had not returned to work that day.
30. However, the Tribunal finds that the relevant part of the factual matrix was not in dispute. The Claimant accepted he had not signed in and out properly that day and on other occasions, he accepted he knew the process, and accepted the health and safety implications of not following the process properly. The Tribunal notes that the Claimant was a manager and as such should have been an example to his staff who he should be ensuring also followed the procedure.
31. The Claimant's witness statement does not mention race discrimination and the notes of the investigation meeting and the disciplinary hearing similarly to not mention race. The Tribunal accepts that the Claimant used the word "*discrimination*" in a letter dated 19 March 2019 sent the day before the disciplinary hearing. Mr Carey said he had not seen this letter at time he conducted the disciplinary hearing or when he made his decision and we have no reason to doubt that. The Claimant did not raise race discrimination in the disciplinary hearing.
32. At the appeal hearing when the Claimant raised discrimination, it was in relation to the searches which were not conducted by the Respondent but by Sainsbury's management. The Tribunal is satisfied that the Respondent took reasonable steps to ascertain from Sainsbury's what happened, but Sainsbury's were not forthcoming in its response.
33. The Claimant relies on the matters set out above for his claim of constructive unfair dismissal. Taking them in turn, the Tribunal finds that the Claimant's claim of a breach of the implied term of mutual trust and confidence is not made out.
 - (a) On 7 January 2019, Hazel Murray visiting the store unannounced in order to target the Claimant.
 - i. The Tribunal does not find this allegation to be made out. Ms Murray's evidence was that it is not uncommon to arrive at a store unannounced and that she did so for several stores on 7th January 2019 and in the few days that followed.
 - (b) Hazel Murray failing to deal with the Claimant's complaint about being stopped and searched in the store and feeling that he was being targeted.
 - i. In her witness statement, Ms Murray said she had no recollection of the Claimant raising the issue relating to searches. The Claimant said

in cross examination that he told Ms Murray personally in the staff canteen. This was not in his witness statement and was not put to Ms Murray during her cross examination. The Tribunal finds on balance, that the Claimant did not tell Ms Murray and that she did not know he had an issue with this. The only question put to Ms Murray in her evidence about this issue, was from the Tribunal and those were more about the policy of search. Ms Murray said she also been searched on several occasions.

- (c) Hazel Murray instituting disciplinary proceedings against the Claimant.
 - i. Miss Murray wrote an email complaining about the Claimant's behaviour to her line manager. Her line manager started the disciplinary process by initiating the investigation which led on to the disciplinary hearing. This allegation is unfounded.

- (d) Hazel Murray producing, in the course of the disciplinary proceedings, a witness statement saying that the Claimant had been verbally abusive towards her.
 - i. The statement produced was an email Miss Murray wrote at the time of the incident on 7 January 2019 to her line manager. This reflects the concerns she had after her conversation with the Claimant. It was not created during the disciplinary proceedings, but before it. Miss Murray is entitled to complain if there is something she feels concerned about. It became apparent during the Claimant's evidence that his complaint was he had not been sent a copy of Ms Murray's email prior to the investigation. The Respondent's policy does not say this must happen. The invite to the disciplinary hearing enclosed, on the face of the letter, various documents, including four witness statements. One of those was the email from Ms Murray. The Claimant said he did not have this statement at the disciplinary hearing. The notes of this meeting make it clear that Mr Carey read out her email and gave the Claimant the opportunity to comment. The Claimant acknowledged he did get a copy of the statement either during the hearing or shortly after.
 - ii. The Tribunal finds on balance the Claimant was sent the document in advance. If we had found that the Claimant did not get this email prior to the disciplinary hearing it is clear he was told what it said and had it at the appeal. In any event, Mr Carey did not find this allegation to be proved and did not issue the written warning in relation to this. Clearly the intention was that the Claimant would have this email prior to the disciplinary hearing and if it were not enclosed then this was most likely a mistake. This mistake was remedied at the hearing with Mr Carey reading out the email.

- e) A written warning being issued against the Claimant.
 - i. The Claimant was given a first written warning which was the lowest level of sanction available to the Respondent. Of note, is that the

Claimant had a practice of not signing out when he left the store. The Tribunal accept that one purpose of the sign out sheet is to establish who is in the store in case of an emergency. The Tribunal find that Mr Carey, having listened to the Claimants mitigation dismissed two of the allegations and then gave the lowest form of sanction to the third. Given that the Claimant accepted he had not signed out, this is an appropriate sanction particularly bearing in mind that he was a manager.

- f) The Claimant's appeal against the written warning being dismissed.
- i. The Claimant alleges the appeal process was a rubber-stamping exercise. The Tribunal disagrees. Mr Pascoe, who is a very experienced manager, reviewed the disciplinary process, and the Claimant accepts he was given ample opportunity to make any comments he wanted to. Mr Pasco having considered the matters carefully upheld the sanction. Mr Pasco also made efforts to get information from Sainsbury's management about the search issue which shows he took the Claimant's concern seriously. He agreed it was a potentially serious matter but there was not much he could do as the Respondent is not control of how Sainsbury's search policy is implemented. The inference of Mr Pascoe trying to find information about this is that if the Claimant had been targeted for searches because of his race then Mr Pascoe would not have found that acceptable. He was however limited in what steps he could take.

34. The Tribunal has looked at the way the disciplinary process was conducted and finds that it was conducted in accordance with the disciplinary policy and in the spirit of the ACAS code of practice. Although it was not perfect it was not "shambolic" as submitted by the Claimant. The Claimant was given the right to be accompanied which he did not take up, was given the opportunity to say what he wanted and signed the notes of the meetings to record they were an accurate reflection of what had been said. Mr Carey accepted that in his view the investigation was not thorough enough in relation to the 7 January 2019 matter and decided not to proceed with this. This was a reasonable thing to do.

35. The Tribunal finds that the disciplinary process was applied proportionately and fairly. The Claimant was listened to resulting in two charges being dropped and one attracting only the lowest form of sanction available.

36. The Tribunal does not find that there was a fundamental breach of contract such as to damage the implied term of trust and confidence. The opposite is the case, in that the Respondent listened to the Claimant and despite the evidence it had, chose not to proceed with two of the allegations which could have led to his dismissal and to impose an appropriate form of sanction in relation to the third.

37. In all the circumstances the Tribunal finds that the Claimant resigned and was not constructively dismissed by the Respondent. The Claimant says that the Respondent wanted to get rid of him. Had this the case then the Respondent would have found against on all the allegations arising from the investigation and could have dismissed. Secondly, when the Claimant resigned the Respondent sent an email asking to reconsider his resignation and offering to meet to try to resolve any issues. If they had wanted to get rid of him, they have simply accepted his resignation.
38. There was no breach of the implied term of trust and confidence. The Claimant has not cited a last straw event that triggered his resignation on 28 May 2019. The Tribunal further finds that the Respondent did not discriminate against the Claimant on the grounds of his race. The Claimant's claims are dismissed.

Employment Judge Martin
Date: 23 September 2020