Case Number: 3321296/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mohammed Arab	**v**	Sports Direct International Plc

Heard at: Cambridge **On**: 7 September 2020

Before: Employment Judge Ord

Appearances
For the Claimant: In person
For the Respondent: Mr M Humphries, Counsel

JUDGMENT

The Claimant's complaints that he was (constructively) unfairly dismissed and dismissed in breach of contract, are not well founded and his claim is dismissed.

REASONS

1. The Claimant was employed by the Respondent from 14 May 2007 until he resigned on 14 May 2019. He was initially employed as an Assistant Manager, but on 12 July 2010 his role changed to Floor Supervisor.

2. The Claimant presented his claim to the Employment Tribunal on 12 August 2019 after a period of Acas Early Conciliation lasting from 30 June to 30 July 2019. At a preliminary hearing held on 22 April 2020, the Claimant withdrew his previously lodged complaints of race discrimination, age discrimination and discrimination on the grounds of religion or belief. At that hearing Employment Judge Laidler clarified that his complaint of constructive unfair dismissal related to a demotion from Assistant Manager to what was described as *"a supervisory role"*. Although that was said to have occurred in 2011, it is accepted by both parties that the Claimant's only role change was to Floor Supervisor which took place on 12 July 2010. It is that matter about which the Claimant complains. He says he resigned as a result of that matter which he says was a fundamental breach of contract and says that he was working under

protest for the entire period between 12 July 2010 and his resignation on 14 May 2019.

The Issues

3. The issues for the Tribunal to determine were therefore as follows:

   3.1 Was the Respondent in fundamental breach of the Claimant's Contract of Employment when he was regraded from Assistant Manager to Floor Supervisor?

   3.2 If so, did the Claimant resign in response to that breach?

   3.3 Did the Claimant delay too long before resigning and / or had he affirmed the contract during the intervening period (the Claimant's stating that throughout the entire period he worked under protest and had not affirmed the contract)?

The Hearing

4. At today's hearing the Claimant appeared in person and gave evidence. The Respondent was represented by Mr Humphries of Counsel and called evidence from Mr Barry Rawlinson (Area Manager) and Ms Linda Lavender (Employee Relations Manager). Reference was made to an extensive bundle of documents.

5. Based on the evidence which I have heard, I have made the following findings of fact.

The Evidence and The Facts

6. The Claimant was continuously employed from 14 May 2007 until 14 May 2019 by the Respondent, working at their retail premises as Aylesbury.

7. The Claimant was initially employed as an Assistant Manager, but on 12 July 2010 his position was changed to Floor Supervisor.

8. Under the statement of Terms and Conditions of Employment, a copy of which was given to the Claimant at the time he commenced work, under the heading 'Job Title and Duties' the Respondent reserved to itself,

   "…the right to update your job description from time to time to reflect changes in or to your job, or in the kind of work it requires you to perform. You will be consulted about any proposed changes".

9. Further, under the section of the Contract headed 'Amendments' the Respondent reserved to itself,

> *"…the right to make changes to any of your Terms and Conditions of Employment. You will be advised of any changes in writing one month prior to the implementation and such changes will be deemed to be accepted unless you notify the Company of any objection in writing before the expiry of the notice period".*

10. There is no evidence before me that the Claimant was given written notice of the intention to change his job title from Assistant Manager to Floor Supervisor and I find as a fact that he was not.

11. I am satisfied on the balance of probabilities, however, that he was advised prior to the change that his role was to change. That is clear from the email sent by Zena Epps to Linda Lavender on 22 August 2019, at which time Ms Lavender was conducting investigations into the Claimant's appeal against the outcome of his grievance (raised on resignation).

12. Ms Epps was asked about the Claimant's performance as Assistant Manager and Ms Epps said that he was,

> *"Okay as an Assistant Manager, but I decided to move him to a Supervisor as he wasn't a strong enough Assistant Manager".*

13. Ms Epps was also asked if the Claimant ever expressed to her dissatisfaction with that situation and her reply was

> *"He was disappointed, yes, but he understood why and our relationship was still a good working relationship".*

14. When asked how the Claimant performed as an Assistant Manager, Ms Epps said that he was,

> *"Doing well but I needed more from him, but he showed flaws in certain things, hence the reason for him to be demoted".*

15. Ms Lavender was not challenged under cross examination about this evidence and there was no evidence called from Ms Epps, but I find as a fact, based on the contents of that email, that Ms Epps had spoken to and explained the position to the Claimant before his role was changed to Floor Supervisor.

16. That change of role took place on 12 July 2010. The Claimant did not resign until 14 May 2019 but relies upon the adjustment to his role as the fundamental breach of contract entitling him to resign.

17. In so far as matters were raised by the Claimant as complaints about the way he was treated between the date of change of role and the date of resignation, he did not, when the issues were clarified by Employment Judge Laidler, rely on them as breaches of contract. I was willing to allow the Claimant to use any such incidents as evidence – if they supported this contention – that he was working under protest, as he alleged. However, they could not be relied upon as breaches themselves as that was not how his case had previously been put, it was not the case the respondent had come prepared to meet. Further there had been no suggestion that the clarification of claims and issues undertaken by EJ Laidler was erroneous and there was no application before me to amend the claim.

18. The change of role did not involve any adjustment to the Claimant's base salary, but did, I was told very late in the day, involve a change in his bonus arrangements. That was only raised by the Claimant during the course of his closing submissions. There were no details given of how, or to what extent, his bonus arrangements were altered. In his Schedule of Loss, he did not make any claim for lost bonus payments. The Respondent agreed that a Floor Supervisor's bonus scheme was different to that of an Assistant Manager, but there was no evidence before me to what extent, if at all, that would have resulted in financial loss to the Claimant. It is for the claimant to show that the respondent is in breach and he must do so by evidence. No evidence was before me to indicate that the change in role caused financial loss.

19. The Claimant identified a number of specific occasions when he said that he raised the issue of his demotion / change of role and evidenced that he was working under protest. I was taken to those and other contemporaneous correspondence during the course of his cross examination by Mr Humphries.

20. On 13 February 2011, the Claimant wrote to Mr Rawlinson by email. In the course of that email, he referred to the fact that,

> *"In the last six months or so Aylesbury store witnessed a few changes in the management department, it was a major decision, I had to respect; to my understanding it was a window of opportunity to take the store that step further in raising the standards…"*

21. The Claimant accepted that the changes he referred to in that email included the change in his role.

22. When asked specifically why he did not, during the course of this email, raise complaint about the change, or indicate that he was continuing to work under protest and always anticipating a return to the role of Assistant Manager, (the Claimant also alleging that he was told that his move to Floor Manager was for a limited period only), the Claimant alleged, for the first time, that this statement had been produced at the request of either Mr Rawlinson or Mr Banks because they wished to arrange for the dismissal of a Mr Durham due to problems with stock taking.

23. When Mr Rawlinson was asked about this, his evidence was that if there was a stock shortfall this would be dealt with by reference to specific numbers of items of stock missing and the anticipated losses in any store and would in his words, be dealt with *"on the hard numbers".* He did not believe that the issues of stock loss would be dealt with by witness statements and he denied ever suggesting to the Claimant, either directly or indirectly, that he should make a statement in relation to Mr Durham's position, or for any related reason. He was not challenged on this.

24. I accept Mr Rawlinson's evidence in this regard. The Claimant had not previously suggested that this was why he had written the email and it is noted that he wrote it at a time when he himself was under investigation for possible disciplinary action due to poor stock take preparation and poor stock take results.

25. Other than to suggest that he was prevailed upon to make this statement for the purpose of assisting in the dismissal of Mr Durham, the Claimant did not explain why he did not set out in the statement any concerns he had over his re-grading which had occurred seven months earlier.

26. The Claimant's evidence was that his move from Assistant Manager to Floor Supervisor was intended to be a temporary short term arrangement to enable another employee to have their confidence boosted as an Assistant Manager, this as a precursor to their moving to the role of Store Manager. That is not raised in the email of 13 February 2011, the Claimant in fact stating that he had *"high hopes"* following what he described as a *"revolutionary change"* for the future of the store. The respondent's witnesses, in particular Mr Rawlinson, denied that such a move would ever be on a temporary basis and I find as a fact that it was not, there being no evidence to support the suggestion that the claimant had, as he alleged, been moved to floor supervisor on a temporary basis.

27. In July 2012 (two years after the change of role), the Claimant had a meeting with Mr Burden. The Claimant covertly recorded this meeting. An agreed transcript of the meeting forms part of the bundle of documents put before me. That meeting took place on 22 July 2012 and during the meeting the Claimant said that he was *"pushed to be a supervisor"* and said (on the evidence which I have seen for the first time), that,

> *"the original agreement a short while, you know, just to give someone else confidence"*.

28. The Claimant was asking to be returned to the position of Assistant Manager. Mr Burden, when the Claimant returned to the subject said this,

> *"Listen. You are doing the job that you are supposed to be doing. You are a Floor Supervisor, yep? A Floor Supervisor and you are*

> *doing a good job, that's cool. You obviously think you should be something else, but I don't know what".*

29. Further on in the conversation, Mr Burden said this,

> *"[I] can't make you Assistant Manager here. It's never gonna happen mate, honestly".*

30. If the Claimant had previously been in any doubt or held out any expectation of a return to the role of Assistant Manager at the Aylesbury store, Mr Burden's words on 22 July 2012 made the Respondent's position entirely clear.

31. The claimant participated in an appraisal meeting on 19 February 2013, conducted by a Mr Pollard, which the Claimant had again covertly recorded. The Claimant was asked by Mr Humphries where in the transcript of that meeting he raised protest regarding his position as Floor Supervisor. The Claimant relied upon the very opening words of Mr Pollard where he says that the appraisal was an opportunity to bring up any concerns and issues the Claimant might have in terms of the past six months and said,

> *"It's not a, it's not a chance for you to use it as a tool to discuss or, right, scrap that, don't worry, it's fine. Okay, so, Sarah and I sat down prior to Sarah leaving because obviously I have worked with you a week and a half if that".*

32. The Claimant says that this was Mr Pollard shutting down any discussion about anything other than the Claimant's performance and issues he had over the last six months.

33. There was no evidence before me to suggest Mr Pollard was at this stage either aware of the Claimant having raised any complaint regarding his position, nor that his opening remarks were designed to prevent the Claimant raising issues of which he was unaware. Indeed, his words *"scrap that, don't worry, it's fine"* indicate that he was willing to discuss any matter, not just concerns or issues the claimant might have in terms of the past six months.

34. Even if he was endeavouring to shut down such discussion, however, the Claimant could have raised it. Even if Mr Pollard had been unwilling to discuss it, the Claimant – knowing that his meeting was being recorded covertly without the knowledge of Mr Pollard – could have raised it and ascertained Mr Pollard's view.

35. Further, in October 2013, the Claimant received, but did not sign or return, an updated Contract of Employment. This described his position as *"Floor Supervisor"*.

36. The Claimant accepted that whilst he did not return or sign the contract, he did not raise any question or complaint regarding the status as described in that contract.

37. Finally, the Claimant referred to a further meeting on 4 February 2019 with Mr Rawlinson, which again the Claimant had covertly recorded.

38. On this occasion the majority of the meeting had not been transcribed and put before me. The Claimant accepted that he disclosed to the Respondent only one part of the meeting, the final part. He only sent the Respondent that part of both the recording and transcribed that part. He said that the rest was *"irrelevant"*. In the absence of any transcript it was impossible to reach any conclusion whether the matters discussed earlier in the meeting were relevant to the Claimant's complaints or not.

39. In that part of the transcript which was before me, the Claimant pointed to Mr Rawlinson's words when he said,

> *"No more talking about working under protest, and all that kind of stuff, yeah? We are a team!"*

40. The words used by the Claimant prior to those comments from Mr Rawlinson are described in the transcript as inaudible.

41. The earlier discussion up to that point, in so far as it has been disclosed, refer to a problem which the Claimant was having with a colleague, Samantha. When it was put to the Claimant by Mr Humphries that the issue of *"working under protest"* related to his dispute with Samantha, the Claimant did not give a clear answer. He referred to Mr Pollard *"knowing what he said"* and repeated on more than one occasion that he *"respected but did not accept"* the decision to move him to Floor Supervisor.

42. Given the fact that only part of this meeting has been transcribed and disclosed and given that the Claimant did not give any satisfactory explanation as to why that was the case, other than to say that he considered the earlier part of the meeting to be irrelevant and further given that the Claimant was, immediately prior to the comment by Mr Pollard about *"no more working under protest"*, engaged in a discussion about his relationship with a store colleague, I find as a fact, on the balance of probabilities, that the issue of *"working under protest"* was raised by the Claimant in relation to his working with Samantha. That was the thrust of the conversation with Mr Rawlinson at that time and the issue of protest related to strained relations between the Claimant and his colleague and not to any re-grading which had taken place, by then, eight and a half years previously.

43. The Claimant resigned on 14 May 2019. In his letter of resignation, he said that he was

> *"…left with no choice but to resign in light of my recent experiences regarding the following points:*
>
> *a. fundamental breach of contract;*
> *b. anticipated breach of contract;*
> *c. breach of trust and confidence; and*
> *d. last straw doctrine."*

44. The Claimant did not, in that letter, give any details but when asked under cross examination whether the *"recent experiences"* related to the period shortly before the resignation, in particular the discussion he had had on that same day with the then Assistant Manager Zara Healy, he described that as *"the last straw"* and confirmed that the thing that prompted him to resign was her behaviour towards him. He described the re-grading nine years earlier *"part of a series of events"*.

45. On receipt of his letter of resignation, the Claimant was advised by email that the Respondent wished to invite him to attend a grievance meeting to discuss the matters which had led to his resignation. The stated view of the Respondent was to reach an amicable resolution enabling the Claimant to return to his job with the company. The Claimant readily agreed.

46. The grievance was investigated by Lawrence Amagbo, another Area Manager. The Claimant had indicated that his grievance related to the allegation that,

> *"…after three or four years of service with the company, Mr Rawlinson spoke to you and advised that he could no longer have two Assistant Managers in the store and that he would be putting you down to a Floor Supervisor".*

47. The Claimant said that this was,

> *"…because (Mr Rawlinson) was preparing the other Assistant Manager to become a Store Manager"*

and that he *"assumed"* that after this period he would return to his original role of Assistant Manager. The Claimant said he had spoken about this to Mr Rawlinson, but nothing had been done.

48. The grievance was not upheld. Mr Amagbo said that there was no evidence to clearly indicate why the Claimant's job title had changed, but that if the Claimant had any further evidence he should send it to the Human Resources department, or to Mr Amagbo himself, so that the matter could be looked into further. Equally, he was advised that if he considered that the decision to be unfair he could lodge an appeal.

49. That outcome was sent to the Claimant on 4 July 2019 and on 16 July 2019 he appealed.

50. The grievance appeal was conducted by Ms Lavender. Her unchallenged evidence, having set out the details of the lengthy investigation which she undertook including interviewing a number of individuals and listening to the recordings then provided by the Claimant, were that the decision to alter the Claimant's role was in part that of Ms Epps, the relevant Store Manager, who said that the Claimant was disappointed but understood why his role had been changed; Mr Rawlinson did not say that the change in role would be on a temporary basis, the management changes were being made to address performance issues at the Aylesbury store. She also concluded that the Claimant had been accommodated in a role that suited his skills and experience. There had been no formal objection to the change in the Claimant's role, nor had he raised a grievance prior to his resignation almost 9 years later.

51. Ms Lavender considered the grievance to be without merit and it was not upheld. She found no evidence to support the Claimant's assertion that there had been a fundamental breach of contract, any anticipatory breach of contract, any breach of trust and confidence or any last straw incident which he alleged left him with *"no option"* but to resign.

52. It is against that factual background that the Claimant brings his complaints.

The Law

53. Under Section 94 of the Employment Rights Act 1996, every employee has the right not to be unfairly dismissed.

54. Under Section 95(1)(c) of the Employment Rights Act 1996, an employee is dismissed if the employee terminates the contract under which they are employed, with or without notice, in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

55. In the well known case of Western Excavation (ECC) Ltd. v Sharp [1978] ICR 221, the Court of Appeal laid down the test to be considered when dealing with a complaint of what is called 'constructive dismissal'. The Claimant must establish that there has been a fundamental breach of contract by the Respondent, that he or she resigned in response to that breach and that they did not delay unduly in doing so, so as to affirm the contract of employment. In the words of Lord Denning,

> *"The employee must not wait too long"*;
>
> and
>
> *"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".*

56. In the case of Chindove v William Morrison Supermarkets Plc EAT 0201/13, the Employment Appeal Tribunal emphasised that the issue of affirmation is one of conduct, not simply passage of time. The Appeal Tribunal warned against looking at the mere passage of time and that what matters is whether in all the circumstances, the employee's conduct shows an intention to continue employment rather than resign.

57. In Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, the Court of Appeal confirmed that the employee's own situation should be considered as part of the circumstances as resigning from a job is a serious matter with potentially significant consequences for an employee. The more serious the consequences the longer the employee make take to make such a decision.

58. In W E Cox Toner (International) Ltd. v Crook [1981] ICR 823, the Employment Appeal Tribunal emphasised that there comes a point at which delay will indicate affirmation. In that case a Director was accused of gross dereliction of duty and after six months of correspondence, largely conducted through Solicitors, the employer finally refused to withdraw its accusation. The Director then waited a further month before resigning. The Appeal Tribunal emphasised that mere delay by itself does not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of affirmation. Reference should be made to the fact that throughout the period the employee had continued to work and be paid under the contract and even if it were arguable that he was working under protest for six months, the delay after the company had finally made its intentions clear was fatal for the Claimant's claim that he had not affirmed the contract, in the circumstances of that case.

59. The Claimant took me to the Court of Appeal decision in Abrahall & Ors v Nottingham City Council & Anr [2018] EWCA 796. In that case, Council employees continued to work following the employer's imposition of a pay freeze, the Court of Appeal finding that if an employee works without protest after a variation of contract is imposed, acceptance should not necessarily be inferred. The Court of Appeal set out principles on whether acceptance should be inferred, including that the question was to be determined objectively, that acceptance should only be inferred from conduct where that conduct brooks no other reasonable explanation; where the variation is wholly disadvantageous then acceptance is less likely to be inferred; collective protest may suffice to negative any inference otherwise to be drawn even if the individual employees themselves say nothing and an employer's reliance on inferred acceptance will be weakened by the employer representing that there was no variation of contract and thus that acceptance was unnecessary.

Conclusions

60. Applying the facts found to the relevant law I have reached the following conclusions.

61. The Claimant has not established that the change in his role from Assistant Manager to Floor Supervisor was a fundamental breach of contract.

62. The Claimant's salary was secured and there was no evidence before me of any detrimental change to the bonus arrangements which pertained to the role of Floor Supervisor. The change in status was not one which was in breach of the terms of the Claimant's Contract of Employment which allowed the Respondent to update or alter the Claimant's job description from time to time to reflect changes to his job, or in the kind of work it required him to perform. Nor was it contrary to the further contractual right to make changes to any of the Claimant's Terms and Conditions of Employment. On behalf of the Respondent, Mr Humphries accepted that this did not give the Respondent *"carte blanche"* to make changes that would amount to fundamental changes to the Claimant's contract, but I find that the changes implemented by the Respondent at the time and the alteration of the Claimant's role from Assistant Manager to Floor Supervisor, was permitted by the Contract itself. If the issue for the claimant was one of status he did not pursue that line either in his own evidence or in cross-examination of the respondent's witnesses and I cannot therefore conclude that there was any loss of status or that if there was, it was sufficient to establish a fundamental breach.

63. When the Claimant received an amended contract in October 2013 which stated his role clearly to be Floor Supervisor, he did not raise any complaint or objection. He continued to work thereafter, in that role and in receipt of the appropriate salary. Thus, I would have found that if the change on 12 July 2010 had been a fundamental breach, his receipt of the new contract and his continuing to work under it thereafter for over 5 years was clear evidence of affirmation of the contract of employment and acceptance of the terms in the contract sent in October 2013.

64. The Claimant, I find therefore, accepted any change in his Contract of Employment and whilst during the course of his evidence, he referred to *"respecting"* the decision but not *"accepting"* it, his email to Mr Rawlinson of 13 February 2011 is indicative of acceptance and indicative of an employee who was willing to, and who does, continue in employment thus waiving any breach of contract.

65. On that basis alone, the Claimant's complaint would fail because there was no fundamental breach of contract upon which he could rely.

66. Even if there was a fundamental breach, however, the Claimant clearly delayed for an inordinate period of time before purporting to resign in reliance upon it.

67. The period between the change of status and the resignation was 8 years and 10 months. During that time the Claimant worked and drew his salary. He did not, contrary to his allegations, complain about the change in status, nor do anything to evidence his allegation that he was working *"under protest"*. He raised no grievance and put nothing in writing to the Respondent, nor did he raise any complaint.

68. Even if he had, however, the Respondent's position was fixed and made clear to the Claimant by, at the very latest, 22 July 2012 when the Claimant met Mr Burden. He told the Claimant, in relation to the prospect of the Claimant being Store Manager at the Aylesbury store, that *"it's never going to happen"*. That could not be clearer and the Respondent's position was fixed and communicated to the Claimant in those very clear and precise terms 6 years and 10 months before the Claimant resigned. Given that in the case of W E Cox Toner, above, delay of one month after the employer's position was made clear was fatal to the employee's complaint and amounted to affirmation to the contract, this delay (6 years and 10 months) is, I find, irrefutable evidence that the Claimant had chosen to continue to work rather than to resign and consider himself dismissed.

69. That was reinforced in October 2013, 5 years and 7 months before the Claimant resigned, when he received a revised, updated Contract of Employment which set his position as Floor Supervisor.

70. I did not find any evidence which establishes that the Claimant was at this, or at any time during the period, working under protest. However, even if he had been, in July 2012 the Respondent made its position absolutely clear and in October 2013 he received an updated and amended Contract of Employment confirming his position as Floor Supervisor. Delay thereafter would, I find, amount to affirmation of the Contract of Employment.

71. The Claimant points to a lack of overt consent to the change of role, but his conduct throughout the period, in particular after July 2012 and October 2013 through to May 2019, when he remained in employment, carrying out the work of Floor Supervisor and drawing the appropriate salary without making any indication of his working *"under protest"* or raising any grievance regarding the matter, demonstrates in my view his clear intention to remain in employment, waive any breach of contract (no fundamental breach having occurred in any event) and choosing to continue to work rather than resign and consider himself discharged. That remained the position for a period of years with the Claimant working and accepting salary in the role of Floor Supervisor without raising any complaint.

72. Finally, even if there had been a fundamental breach of contract when the Claimant's status or job title was changed and even if the Claimant had established to my satisfaction that he had worked under protest for the 8

years and 10 months prior to his resignation without affirming the contract, his claim would still have failed because he admitted himself that the matter which prompted his resignation was the dispute which he had with a work colleague earlier on the same day as he tendered his resignation. That matter had no connection whatsoever with the change of status and whilst the Claimant referred to the incident being a *"final straw"* that was not the way he put his case in these proceedings. At the Preliminary Hearing on 22 April 2020, the Claimant clearly set out that his complaint of constructive dismissal related to his demotion, as he called it, from Assistant Manager to Floor Supervisor and no other matter was referred to. In fact, on his own evidence before me, the reason why he resigned – what he describes as the 'final straw' – was an unrelated dispute with a work colleague.

73. Accordingly, the Respondent had not committed a fundamental breach of the Claimant's Contract of Employment on 12 July 2010, in any event the Claimant was not thereafter working under protest,and the Claimant delayed for such a period of time (8 years and 10 months) before resigning allegedly in response to that fundamental breach but in fact for an unrelated reason so as to have clearly affirmed the contract. The Respondent had made its position abundantly clear on 22 July 2012 through Mr Burden and again in October 2013 when sending the Claimant an updated Contract of Employment but the Claimant still delayed until 14 May 2019 before resigning and that conduct alone would be sufficient, I find, to amount to affirmation. The delay was excessive, although in any event I have found as a fact that his resignation was not as a result of the events of 12 July 2010, but as a result of the events of the day of his resignation when he had a dispute with a work colleague.

74. For those reasons the Claimant's complaints fail and his claim is dismissed.

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Employment Judge Ord

Date: 14 September 2020

Sent to the parties on: 5 October 20

For the Tribunal Office