



EMPLOYMENT TRIBUNALS

Claimant

Mr Patrick Ferguson

v

Respondent

MPS Housing Limited

Heard at: Bury St Edmunds (By Video CVP) **On:** 15/16 September 2020

Before: Employment Judge Cassel

Appearances

For the Claimant: In person.

For the Respondent: Mrs J Fry, Solicitor

JUDGMENT

1. The claim of constructive unfair dismissal fails and is dismissed.

RESERVED REASONS

Introduction

1. This has been a remote hearing on taking oral evidence which has not been objected to by the parties. The form of remote hearing was by video and all the parties were either in their homes or offices. A face-to-face hearing was not held because it was not practicable in view of the present healthcare crisis.
2. The claim was listed for hearing on 15/16 September 2020. I ensured that Mrs Fry, who represented the Respondent, the two witnesses that she called and the Claimant were able to follow the proceedings throughout notwithstanding the occasional technical difficulty that required adjournments at various times. The hearing in fact could only take place starting at 2 o'clock on the first day as the Claimant had difficulty in obtaining adequate Internet coverage for the proceedings.
3. Having discussed with both parties how the proceedings should be conducted I determined that it was more appropriate to hear first from the Respondent's witnesses which, bearing in mind the overriding objective within the rules, assisted the Claimant in being able to present his case.

4. I was provided with a bundle of documents which comprised 135 pages. Prepared statements were presented which in fact referred to approximately just 12 of those pages. I explained to the parties that notwithstanding any case management orders that had been made I was quite prepared to have documents pointed out to me that may have been overlooked. In order to do so I indicated when each of the witnesses was giving evidence the particular paragraph which I was reading, at the end of which the witness in question had the opportunity of indicating any relevant documentation that was not referred to within the statement. I made it equally clear that apart from the claim form, the response form and correspondence to and from the tribunal I would not consider any documents to which my attention had not been drawn.

5. In addition to the bundle of documents and the witness statements I was provided with a chronology and a cast list.

Evidence

6. I heard evidence from the Claimant, Mr Patrick Ferguson, and from two Respondent witnesses, Mrs Jackie Edmonds, previously HR business partner for the Respondent, and Mr Philip Tovey, formally partnership director of the Respondent. At the end of the submissions made by both parties, for which I am grateful, I announced my decision and that my reasons were reserved which I give herewith.

Findings of Fact

7. I make the following findings of fact based on the balance of probabilities.

8. The Claimant commenced employment on 18 April 2006 for Mitie. He worked continuously throughout his employment which was transferred to the Respondent in 2018. His most recent written terms and conditions of employment were issued in November 2013 which described his position as operations manager. For all of the years that he worked for the Respondent or his former employer, he worked with Mr Tovey, or if not for him, Mr Tovey explained, in such a way that the relationship continued to some considerable extent. The Claimant gave evidence that many of his working practices were developed when he worked for Mr Tovey, and it was clear that he held him in considerable esteem. Mr Tovey gave evidence that in his words "I valued him, that's why he was wanted, he had a good work ethic and was a hard worker.

9. The Respondent valued the Claimant's qualities. There was no dispute that he acted as a "trouble-shooter" and assisted in many of the contracts that were won by the Respondent, which numbered 30 or so. Similarly there was no dispute that the Claimant worked on a contract which was to provide services to London Boroughs of Hammersmith and Fulham. That contract was lost and on the evidence made available to me, which was somewhat vague, the services provided by the Respondent were the subject of contracts won by a number of

contractors. There was little dispute that prior to the transfer taking place, which was on or around 16 April 2019, the Claimant had been working exclusively on that contract for about two or three months or possibly longer. Two of the senior managers or directors, Mr Warren Colvin and Mr Philip Byrne, neither of whom gave evidence, placed the Claimant in a list of employees that were to be transferred to the incoming contractors on 16 April 2019. Only limited information was given to the Claimant and he was unclear, and unsurprisingly unhappy about the situation, as the identity of the transferee was uncertain.

10. The Claimant objected to being on the TUPE transfer list of employees. On 20 February 2019 however in an email to Mrs Edmonds he made the following comment “Best I take out a formal grievance straightaway.”

11. On 4 March 2019 a conversation took place between the Claimant and Mrs Edmonds when the Claimant made it clear of his concerns about being on the transfer list as he had worked over multiple contracts and multiple sites.

12. On 12 March 2019 he provided details of his grievances in an email which was produced at page 69. He had various complaints relating to the treatment that he received at the time of the proposed transfer and previously in a number of ways. Although there was some dispute in evidence, I do find that Mrs Edmonds took the matter seriously and on 1 April 2019 a grievance hearing took place and the Claimant’s name was subsequently removed from the list of those to be transferred.

13. Prior to that meeting, on 22 March 2019 Mrs Edmonds by email put various options to the Claimant as to his future choices. One of those was that he transferred to what was described as the Home Group Contract. The Claimant was unsure as to whether he had in fact received that email but it is apparent in the email trail that he did in fact receive it, on 25 March 2019.

14. Following the grievance hearing on 1 April 2019 the Claimant had a meeting with Mr Tovey. There was a dispute in evidence as to what was said during that meeting. The Claimant believed that the position that he was being offered on the Home Group Contract was going to last no more than 3 to 6 months at which point in his opinion, he was likely to be dismissed by way of redundancy. He was adamant that that was said to him during the meeting. Mr Tovey’s evidence was in terms that the first 3 to 6 months the Claimant would help with what was described as “mobilisation” of the contract, by which I understood it to mean that that period would ensure that it ran smoothly following which there would be a discussion as to his future role. Mr Tovey gave evidence that there was a difference of opinion apparently only subsequent to the meeting. He was clear that he considered that the Claimant was being offered a permanent role, the contract itself was for 14 years, with a discussion at the end of 3 to 6 months about which contracts the Claimant would be involved in, not dissimilar from the arrangements that had been in place in the past and that the Claimant would help with various projects. I prefer the evidence of the Respondent and that of Mr Tovey. The letter to which I have referred at page 82, which the Claimant apparently received, makes no mention of any time limits to the position and indeed refers to future mobilisations.

15. In any event the Claimant accepted the offer of work on the contract offered by Mr Tovey and on 16 April 2019 commenced work on it.

16. However on 23 April 2019 the Claimant gave one months' notice having decided to resign and in his letter of resignation to Mr Tovey complained about his treatment in respect of the proposed TUPE transfer, that he had been threatened with redundancy if he didn't transfer, that a proposed compromise deal had not been progressed and that he had not been provided with a figure for compensation, that his grievance had not been the subject of a written response and that he believed that the role that he was undertaking was on a temporary basis.

17. Later that day the Claimant met with Mr Tovey. Mr Tovey gave evidence that the Claimant had told him that he didn't think the role was for him and that he was leaving and that he also believed that the role wasn't a permanent one. He was reassured as to the permanence of the position and was advised to think matters overnight and a further meeting was arranged the following day. On 24 April 2019 the Claimant confirmed that he had not changed his mind and his resignation was formally accepted. That was his last day of work and five days later the Claimant started new employment and on 13 May 2019 he was provided with a written outcome of his grievance.

18. I find that the contract of employment ended on 24 April 2019 by reason of the Claimant's resignation.

Conclusions

19. Section 95 (1) (c) of the Employment Rights Act 1996, is in the following terms:

For the purposes of this Part an employee is dismissed by his employer 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

20. For a claim of constructive unfair dismissal to succeed the Claimant has to show that there has been a breach of contract. It is a cornerstone in such a claim. There has to be evidence that the employer is guilty of conduct which is a significant breach of contract going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. It is settled law that to succeed in such a claim the Claimant must show that the Respondent was thus guilty of a fundamental breach of contract, or showed an intention no longer to be bound by such an essential term, that the breach and not something else cause the Claimant to leave and that he did not waive his right to terminate the contract by delaying too long after the breach.

21. In giving evidence and in his submissions the Claimant was at pains to explain that he did not consider that the grievance in relation to the matters that he had raised were resolved by him starting the new role under the Home Group Contract. However, in so far as his grievance related to the proposed TUPE transfer that

cannot be right. He objected to his name being included in the list of those to be transferred, and raised a grievance. As a result of raising a grievance, the Respondent followed a fair and reasonable procedure which led to his name being removed from the list. He also complained that there was a lacking of line management. However he stressed that his role towards the end of his employment was a regional one and the evidence points to him being a “trouble-shooter” required to travel to various locations. By its very nature and the trust placed in him, active line management on the evidence before me was less important and it cannot sensibly be argued, given the circumstances of his employment, that that constituted a breach of contract.

22. He also pointed to the speed with which his grievance was dealt. On the timescale clarified in evidence by Mrs Edmonds and supported in documentary evidence, his grievance was outlined in detail on 12 March 2019 and a grievance hearing took place on 1 April 2019. The Claimant decided to resign on 23 April and as a matter of law any breach of contract envisaged under section 95 (1)(c) must have occurred prior to that date. Although there was some delay in responding, on any sensible view and given the nature of the grievances and the contact between the Claimant and the Respondent’s management in the interim, I do not accept that such delay constituted a fundamental breach of contract.

23. The Claimant also expressed the fear that his salary would be reduced. However there was no credible evidence to show that to be the case or that in fact there was a significant change in his role in the position which he accepted. Mr Tovey gave convincing evidence that it was the Claimant’s expertise that he sought and that’s why the Claimant was offered the position.

24. Looking at the evidence, which I must judge sensibly and reasonably, I do not find there was a fundamental breach as described above. Even if there had been such a breach of contract, and I am satisfied that there was not, I do not find that the Claimant left as a result of any alleged breach. He had found alternative employment and commenced that employment within a few days following the termination of his employment with the Respondent.

25. For these reasons I find that the claim of constructive unfair dismissal fails and I dismiss it.

Employment Judge Cassel

Date: 16 September 2020

Sent to the parties on: ...13/10/2020.....
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For the Tribunal Office