



EMPLOYMENT TRIBUNALS

Claimant: Mr J Walters

Respondent: Mears Limited

Heard at: London South Employment Tribunal (by CVP)

On: 17 March 2021 and in chambers on 31 March 2021

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Mr J Walters

For the respondent: Ms Fry, solicitor

RESERVED JUDGMENT

The decision of the employment tribunal is that:

1. The claimant was unfairly dismissed.
2. The claimant suffered a detriment for family reasons.

REASONS

1. By a claim presented on 26 April 2020, the claimant claimed automatic and ordinary unfair constructive dismissal and detriment for family reasons.
2. This has been a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was V. A face to face hearing was not held because it was not practicable and no-one requested it. We expressed concern that the claimant was conducting the hearing via his mobile phone, but the claimant said that he was content to proceed in that way, given the constraints presented by the pandemic.
3. We heard evidence from the claimant and, for the respondent, from Mark Smith (MS), General Manager, and Darren Drew (DD), senior supervisor. All witnesses were cross examined. DD had not been expected to give evidence and had not prepared a written statement, but was called in by the respondent on short notice after the claimant's issues were clarified as set out below. We were referred to a bundle of documents of 173 pages.

4. At the start of the hearing, we explored with the claimant what he was relying on as leading to his resignation. The conclusion of this discussion was that the claimant relied on the following as breaching the term of trust and confidence between an employer and employee:
 - a. Not being provided by the respondent with information he requested in relation to disciplinary allegations.
 - b. On 6 Mar 2020, MS put pressure on the claimant to proceed with the disciplinary hearing although his companion could not attend.
 - c. On 6 March 2020, MS asked the claimant if he had the respondent's tools which made him feel that the disciplinary decision was pre-made.
 - d. The delay by the respondent in notifying him of complaints from tenants which he saw as indicative that they had been raised to get him out. He said that usually complaints were notified to operatives within two or three days.
 - e. DD made a false statement for the disciplinary proceedings that he had never told operatives to sign on behalf of tenants.
 - f. DD told the claimant that he should not have parental leave because, if the claimant did, everyone would want it; and DD challenged the claimant about taking it three times. Although the parental leave was ultimately granted, it was a battle to get it. He felt that his parental leave request was the trigger for what subsequently happened.
5. The respondent accepted that it was able to deal with all of these issues.
6. We also asked the claimant how he considered that he had been treated detrimentally for taking parental leave. The claimant said that it caused him stress to have DD turn down his request and repeatedly challenging him about it on three occasions while he was working so that he felt 'badgered'.
7. It was agreed with the parties that the hearing would first deal with liability. If the claimant won his claim, we would then hear evidence on remedy, including on *Polkey v AE Dayton Services Ltd [1987] UKHL* issues (if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed in time anyway).
8. The respondent pleaded that, if there were a constructive dismissal, the allegations would be likely to have resulted in the claimant's summary dismissal (Grounds of Resistance para 26.)

What happened

9. We find the relevant facts to be as follows.
10. The claimant began employment with the respondent on 11 Dec 2017 and resigned with immediate effect on 11 Mar 2020. He was employed as a multi skilled operative. The respondent provides repairs and maintenance to social housing properties. This is what the claimant did in his day to day role.
11. The respondent received three complaints about the claimant from residents of social housing properties where the claimant had carried out repairs/maintenance. These were on 10 Jan 2020, 16 Jan 2020 and 29 Jan 2020. While investigating this, the

respondent became aware that the claimant was signing off jobs from his home address and signing work tickets on behalf of customers.

12. MS' oral explanation in the hearing of the delay in raising the complaints with the claimant was that MS joined the branch in November 2019, did a handover and took over full management from 1 Jan 2020. At the end of the month, he had an operations meeting when the complaints were brought to his attention and he asked for them to be acted on.
13. DD prepared a statement as part of the disciplinary investigation stating that he had never instructed any operatives to sign off a job on the tenant's behalf. The only exception was communal work. If a signature could not be given, the operative was to inform the supervisor and write down on the job note why the signature was not required and write 'N/A' in the signature box. The claimant said that DD instructed him to sign off on a job on a tenant's behalf. DD's oral evidence under cross examination was that there was an occasion when the claimant called him to say he could not get an aggressive tenant to sign off a job and it was agreed that the claimant would put 'N/A' on the PDA. The respondent was unable to point to any policy or 'tool box talk' on the subject.
14. On 14 Jan 2020, the claimant made a request for parental leave for the period 30 March to 14 April 2020 via the online system 'workday'. He had previously taken parental leave from the employment. DD rejected the request and told the claimant that he would have to take holiday if he wanted the leave. This happened twice. On the third request, DD sought advice from HR and then agreed the request, on 10 Feb 2020.
15. The claimant said that DD appeared at his place of work three times at three different sites and challenged him about his parental leave request. He said DD said to him that if the claimant had the leave, everyone would have it and no-one would do any work.
16. In evidence in chief, DD said that the claimant made his requests for parental leave via an online system 'workday' twice and then called him and emailed him about it; there was only one conversation about it which was by phone. Under cross examination, he said he recalled a conversation with the claimant at a site about the request. He admitted he said to the claimant that they could not give everyone parental leave. He said that he was not aware of family law and thought the claimant was asking for unpaid leave.
17. On 12 Feb 2020, DD asked the claimant to speak to BS, a supervisor. A notetaker was present in the meeting. This was an investigation meeting into the three complaints. The notes record that the claimant was informed at the start of the meeting that it was an investigatory meeting which could lead to disciplinary action. The claimant alleged that he was told the meeting was 'just a chat'. Given that the claimant stated this in his resignation letter, referred to below, we accept the claimant's account that he was told that it was 'just a chat', and that the notes of the meeting were not accurate in stating that the claimant was informed at the start of the meeting that it was an investigatory meeting which could lead to disciplinary action. We consider this indicative of the respondent's willingness to falsely represent what happened in subsequent documents. In the meeting, the claimant was questioned about the three complaints and his working practices as set out above at para 11. He requested that the respondent provide the documents which he considered relevant to the allegations as described at para 20 below.

18. Following the meeting, the claimant was suspended by letter of 13 Feb 2020 pending further investigation into allegations of gross misconduct as follows: Bringing the organisation into disrepute; misuse of company time; fraud, forgery or other dishonesty, including fabrication of company records; breach of trust and confidence. The letter referred to the three complaints and the claimant misleading the respondent by incorrectly reporting his whereabouts through his PDA.
19. By letter of 25 Feb 2020, the claimant was invited to a disciplinary hearing on 2 Mar 2020 by MS. The disciplinary allegations and their basis were as set out in the suspension letter. The claimant was warned that some of the allegations were considered to be gross misconduct and an outcome could be his dismissal. He was informed of his right to be accompanied. He was sent the investigation pack. The letter included: *'If there are any further documents you wish to be considered at the hearing, please provide copies as soon as possible. If you do not have those documents, please provide details so that they can be obtained.'* The respondent changed the date of the meeting to 3 Mar 2020 by letter of 27 Feb 2020 which repeated the same invitation to provide details of documents which the claimant wished to see.
20. On 1 Mar 2020, the claimant wrote to the respondent saying there were material gaps in the evidence provided by the respondent and asking for a postponement of the hearing so it could be provided. He asked for the following: all telephone records for his work mobile for the dates relating to the evidence; all PDA ticket notes for 6 specified jobs; all tracking location records for all the dates relating to the evidence; and all attendance records of meetings, written workplace updates and signed notification of work place updates related to one part of the evidence ('Requested Information').
21. MS considered the claimant's request for the Requested Information. The PDA tickets and tracking locations were already in the disciplinary pack. MS said he could not understand the value of the other information received. MS wrote to the claimant on 3 Mar 2020, rearranging the hearing to 6 Mar 2020 and saying the claimant had already been provided with *'all the information which will be used to make a decision at the disciplinary hearing. If you feel that there are further areas which need to be investigated then you should raise these at the disciplinary hearing on Thursday 6 March 2020; and if appropriate I will adjourn the meeting to conduct further investigation.'* The letter again included its standard invitation to the claimant to request any documents which he thought should be obtained.
22. On 4 Mar 2020, the claimant repeated his request for the Requested Information. He gave a written explanation of its relevance to the disciplinary allegations. He said that the information was required for the hearing to be conducted in a fair, transparent and open manner.
23. MS responded by email of 5 Mar 2020 that he was happy to discuss all points in full that the claimant had raised *'and I will ensure you are provided with any additional investigation work prior to your outcome being delivered to you. However, this will not be available at this meeting.'*
24. The claimant attended for the hearing on 6 Mar 2020, but was informed by MS, who was to chair the hearing, that the claimant's companion could not attend due to sickness. The claimant's and MS' account of what was said was in conflict.
 - a. The claimant said that MS put pressure on him to proceed with the hearing in the absence of his companion. MS spoke to HR and returned saying to the

claimant that the hearing would go ahead with or without him because 'HR wanted it done and dusted. It's been going on for too long'. The claimant also said that MS asked him if he had his company tools. The claimant said to MS he was not happy to proceed and MS went to speak to HR again and then said it would be rescheduled.

- b. MS' oral account in the Tribunal was to deny this and say that he spoke to HR when he found the claimant's companion was ill and gave the claimant two options, to continue with the meeting without a companion or to reorganise it when the companion was available. He said he had no recollection of asking the claimant about his tools. In the Tribunal, we asked MS what 'as previously discussed' referred to in MS' letter to the claimant of 17 March 2020 as referred to below in relation to the tools. MS responded there was an email sent asking the claimant to return his tools. We have searched the bundle and can find no such email.
25. We consider that the claimant's account of what was said is consistent with MS' letter to the claimant of 17 Mar 2020 referred to below, and the claimant's description in his resignation letter referred to below, and we prefer the claimant's version of the discussion.
26. On 6 Mar 2020, MS confirmed the rearrangement of the hearing to 11 Mar 2020. His letter included the comment that MS had told the claimant that he would discuss all his concerns at a rescheduled hearing and conduct further investigation if required.
27. On 9 Mar 2020, the claimant wrote to MS asking whether the Requested Information would be available at the rearranged hearing. We can see no evidence of any response to this.
28. We heard no evidence of any oral discussions between MS and the claimant between 6 Mar 2020 and 17 Mar 2020.
29. On 11 Mar 2020 at 8.57, three minutes before the disciplinary hearing was due to start, the claimant emailed MS resigning as follows:

Further to my email of 9 March, and previous emails, requesting the additional information on four separate occasions in relation to the disciplinary hearing that you advised that will be considered and I am entitled to request has not been provided.

Therefore, it is clear that from the outset the purpose of the steps you, [DD], and [BS] have taken has been to create a false picture and a narrative to support your case for disciplinary action.

The meeting that took place with [BS] on 12 February was predicated on the basis of being a 'chat'. [DD] when asked about the meeting feigned all knowledge of its purpose and said '[BS] just wants to see you'. [BS], when asked repeatedly about the nature of the meeting, and why a note taker was present said it was just a 'chat'. The minutes were later drafted to state that it's purpose and outcome could result in disciplinary action and ultimately led to my suspension. Therefore, I was misled about the purpose of the meeting and denied my statutory rights to representation and pressurised to sign the false account of the meeting, which I did not concede to.

Furthermore, the evidence provided as part of the supposed investigation was incomplete and crafted in such a way as to create a false picture and create a narrative to fit the definition of gross misconduct. The so called evidence item

12, which is the statement from [DD] about using n/a being communicated to all operatives for customer surveys and anything else as being 'fraud' is a complete fabrication. Had this been communicated as company policy it is one that I would have readily complied with. It is also clear from the use of term 'fraud' being used in the minutes of the meeting of 12 February that this was shared and used for the basis of the false statement by [DD]. This is a clear breach of confidentiality.

The significant gaps in time periods included in the so called evidence, although this is readily available/verifiable from the PDA/tracker, supplier invoices, phone records, again were deliberately omitted to create a false picture and a narrative to fit the misuse of company time allegations. The workplace update, dated 24 May 2019 clearly sets out the inclusion of attendance at suppliers, the skip and dropping off and collection of equipment as included as part of operatives working hours and accounts for the majority of the gaps presented in the evidence.

The non-disclosure of the alleged customer complaints, the oldest of which was more than 5 weeks old, where again used as a basis to create a false impression of my character and integrity. During the entire 2.5 years of employment with Mears I have never been the subject of any customer complaints and I have received numerous written commendations on my conduct.

Moreover, from your conduct and that of your colleagues, it is self evident that you do not intend to conduct a fair and transparent process. You have created a false impression of the purpose of meetings; you have purposely withheld information; you have only gathered partial information to fit your purposes as part of the investigation; you have breached my statutory rights; you have tried to coerce me into going ahead with a disciplinary hearing without being represented or to sign false statements. Furthermore, your very words e.g. "HR want to get this over and done with because this has gone on for too long", demonstrate that the outcome has been predetermined and is unlikely to be fair.

Your actions has caused stress and anxiety and have been detrimental to my health and well-being because of the unfair manner in which this issue has been treated. You have made my position untenable and left me with no other option than to resign my position with immediate effect. This is to ensure that my unblemished employment record is not tarnished due to these allegations.

30. On 12 Mar 2020, MS emailed the claimant saying 'as previously stated I would have provided you with any further evidence before giving my outcome' and asking him to reconsider the resignation.
31. On 15 Mar 2020, the claimant responded including: 'I note that you have stated you would discussed my concerns at the hearing. However, your persistence in not providing information I requested on numerous occasions and questioning the very reason why it was required led me to have no trust or confidence that you would have carried out a fair and transparent process as such I felt forced to tender my resignation'.
32. MS responded with a letter of 17 Mar 2020. He made the point with regard to the aborted disciplinary hearing of 6 Mar 2020 that, 'I advised that I would like to continue with the meeting and you did not want to. I informed you that I was considering hearing the meeting in your absence if you left due to it already being rescheduled....' He added that 'as previously discussed, you still have tools supplied to you by Mears which you need to return to the office.'

33. The claimant's oral evidence under cross examination as to when he decided to resign was that it was the night before the disciplinary hearing of 11 Mar 2020 when he said he had a long thought about the position he had been put in and that he not been given the information requested. He felt he was made to feel that the hearing would only go one way and he would not be treated fairly. The respondent did not keep its word and would not provide the information it had access to. It did not do what it said it would do.

Law

Constructive dismissal

34. Under section 95(1)(c) Employment Rights Act 1996 (ERA), 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.

35. To succeed in a constructive dismissal claim, the claimant must show as follows:

- a. A fundamental breach of contract going to the heart of the employment relationship.
- b. The employee resigned in response to the breach.
- c. The employee did not waive the right to resign before doing so.

36. In the case of *Omilaju v Waltham Forest LBC*, the Court of Appeal made the following comments:

"The test for constructive dismissal is whether the employer's actions amounted to a repudiatory breach of the contract of employment..."

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...

Any breach of the implied term of trust and confidence will amount to a repudiation of the contract..."

Unfair dismissal

37. Under section 94(1) ERA, an employee has the right not to be unfairly dismissed by his employer.
38. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
39. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), 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.

Detriment for family reasons

40. Under s47(c) ERA, an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
41. Under regulation 19 of the the Maternity and Parental Leave etc. Regulations 1999, a prescribed reason includes that the employee took or sought to take parental leave.
42. *Ministry of Defence v Jeremiah* 1980 ICR 13; *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337; and *Derbyshire and ors v St Helens Metropolitan Borough Council (Equal Opportunities Commission and ors intervening)* 2007 ICR 841 establish that detriment means simply 'putting under a disadvantage'; that it is not necessary to show any physical or economic consequence; and that it should be assessed from the claimant's point of view, although his or her perception must be 'reasonable' in the circumstances.

Conclusions

43. We did not find the evidence of the respondent's witnesses to be reliable.
 - a. The evidence which MS gave in the Tribunal about his conversation with the claimant on 6 Mar 2020 was contradicted by his own letter to the claimant of 17 Mar 2020. It is clear from his letter that he did not give the claimant a choice about whether to postpone or continue with the disciplinary hearing, as he alleged to the Tribunal, but that he referred to going ahead in the claimant's absence. We consider that MS deliberately sought to mislead the Tribunal in this regard. Consequently, we put no reliance on MS' evidence.
 - b. DD changed his evidence in the hearing saying, at one stage, that he only spoke to the claimant about the parental leave request by phone and, at another, that he spoke to him face to face on site. We do not consider that DD deliberately set out to mislead the Tribunal, but merely that his recollection was unreliable.
44. We found the claimant's evidence generally to be consistent. The part of his evidence which we must scrutinize is his assertion that MS asked him on 6 Mar 2020 if he had his tools. This is not mentioned in the resignation letter or the claimant's subsequent correspondence with the respondent. However, in his letter of 17 Mar 2020, MS refers to a previous discussion about the claimant's return of his tools. We had no evidence of any oral discussion between the claimant and anyone from the respondent between his resignation on 11 Mar 2020 and the letter of 17 Mar 2020. Nor can we find any email between the parties between those dates raising the question of the tools. In fact, the evidence is that the last face to face discussion which MS had with the claimant was on 6 Mar 2020. We therefore conclude that, when MS wrote 'as previously discussed', he was referring to the discussion on 6 Mar 2020 and that, during that discussion, he did ask the claimant about returning his tools, as the claimant asserts.

Constructive dismissal

45. We now turn to the matters relied on by the claimant as representing a breach by the respondent of trust and confidence between employer and employee:

46. Not being provided by the respondent with information he requested in relation to disciplinary allegations:
- a. The respondent did not provide the claimant with the information he requested, in spite of its repeated offer in correspondence to do so and the claimant having explained in writing why it was relevant and having requested it on multiple occasions. Further, MS stated in his correspondence that all the information which would be used to make the decision had already been provided to the claimant (3 Mar 2020), the natural reading of which is that no other evidence would be considered. MS also stated on 5 Mar 2020 that any investigation work would be provided prior to the outcome being delivered, IE that the claimant would have no chance to make any comments on any further investigation outcome prior to the decision being made, and there was no commitment to look into the documents requested. MS did not even respond to the claimant's last request for the documents of 9 Mar 2020.
 - b. We consider that the claimant had genuine grounds to feel that the evidence was incomplete and that, because the respondent did not comply with the claimant's request, the evidence was crafted to present a false picture, as he stated in his resignation letter. The respondent offered to provide documents requested by the claimant and then refused to do so. It indicated that it would make a decision after the disciplinary hearing and without the claimant having had any chance to see the documents which he had requested. This was in the context of gross misconduct allegations which could lead to the claimant's dismissal. The respondent acted contrary to natural justice and it did not do what it said it would do. We consider that its actions breached the claimant's trust and confidence in it.
47. On 6 Mar 2020 MS put pressure on the claimant to proceed with the disciplinary hearing although his companion could not attend:
- a. We find that, on 6 Mar 2020, the respondent did put pressure on the claimant to proceed with the disciplinary hearing although his companion could not attend. MS said to the claimant that the hearing would go ahead with or without him because *'HR wanted it done and dusted. It's been going on for too long'*. A threat to proceed in the claimant's absence was clearly pressure to proceed without his companion. The claimant had a statutory entitlement to a companion. We find that this pressure breached the claimant's trust and confidence in the respondent.
48. On 6 Mar 2020, MS asked the claimant if he had the respondent's tools which made him feel that the disciplinary decision was pre-made:
- a. We have concluded above that MS did ask the claimant about returning his tools on 6 Mar 2020. A request for the return of tools was consistent with the claimant being dismissed. We consider that it was reasonable for the claimant to conclude from this that the decision to dismiss him was pre-made. This breached the claimant's trust and confidence in the respondent
49. DD made a false statement for the disciplinary proceedings that he had never told operatives to sign on behalf of tenants:
- a. We accept the claimant's case that DD did make a false statement that he did not instruct employees to sign on behalf of tenants. This is because we have found DD's evidence to be unreliable and we have found that the respondent

had a willingness to falsely represent what happened in subsequent documents. Further, the respondent was unable to point to any policy or 'tool box talk' on the subject.

- b. We find that being presented with false information in evidence given by a supervisor in disciplinary papers undermines trust and confidence in the employer.
50. The delay by the respondent in notifying him of the complaints which he saw as indicative that they had been raised to get him out. He said that usually complaints were notified to operatives within two or three days:
 - a. We do not consider that there was undue delay in raising the complaints with the claimant. The complaints were made 10 to 29 Jan 2020 and the matters were raised on 12 Feb 2020.
51. DD told the claimant that he should not have parental leave because, if the claimant did, everyone would want it; and DD challenged the claimant about taking it three times. Although the parental leave was ultimately granted, it was a battle to get it. He felt that his parental leave request was the trigger for what subsequently happened:
 - a. There was no dispute that the claimant's request for parental leave was refused three times.
 - b. We accept the claimant's evidence that, more than just refusing the request, DD spoke to him about it on site on three different occasions. The claimant said this was the case and we found DD's evidence on the point unreliable, while he did accept he spoke to the claimant once on site. DD also admitted that he said to the claimant that they could not give everyone parental leave.
 - c. We accept that the claimant would have felt it frustrating and stressful to keep having a period of statutory leave to which he was entitled turned down repeatedly and he would feel 'badgered' by his supervisor turning up on site and disputing his entitlement.
 - d. However, given that the leave was eventually granted, we do not consider this sufficiently serious to breach trust and confidence in the employer.
52. Having found that the respondent breached the claimant's trust and confidence in it in paras 46-49 above, there was a repudiatory breach of contract by the respondent.
53. There was no suggestion from the respondent that the claimant waived the breach before resigning.
54. The question has to be asked whether the claimant resigned because of the breaches or to avoid a dismissal. In his resignation letter, the claimant said he was resigning to ensure an unblemished employment record. However, we consider that, if the claimant had simply resigned to avoid a dismissal, he would not have attended at the disciplinary meeting on 6 Mar 2020. The only reason that did not go ahead was that the claimant's companion could not attend. We accept that it was the events at that meeting and the respondent's ongoing failure to provide the requested information, as per paras 46-48 above, coming on top of the conduct at para 49 above, which prompted the claimant resignation prior to the next arrangement for the hearing, 11 Mar 2020.
55. Therefore, we find that the claimant was constructively dismissed.

Unfair dismissal

56. The respondent did not plead in the alternative that, if there were a dismissal, there was a potentially fair reason for it, and give that reason. We consider that the Grounds of Resistance para 26 is making a *Polkey* argument and not presenting an alternative case for a fair reason for dismissal. This was certainly not argued by the respondent in its submissions. Accordingly, the respondent has not now shown a potentially fair reason for dismissal and the dismissal is unfair.
57. Had the respondent relied on a potentially fair reason of misconduct, we consider that the failings in the disciplinary process (the failure to adduce all the document requested by the claimant; the indication that a decision would be taken after a further investigation the outcome of which the claimant would be unaware of; the indication that the decision was pre-made by requesting the claimant's tools) mean that the dismissal would have been unfair.
58. The compensation payable to the claimant will be considered at a remedy hearing.

Detriment for seeking parental leave

59. We accept that it reasonably caused the claimant stress to have DD turn down his parental leave request and repeatedly challenge him about it on three occasions while he was working so that he felt 'badgered', and that this was a detriment.
60. The compensation payable to the claimant will be considered at a remedy hearing.

Employment Judge Kelly
Date: 31 March 2021