EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Jonathan Bryan	AND	Grace Road Commercial Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 24 May 2021
By VHS Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In Person, Assisted by Mr Churchill**
For the Respondent: **Mr W Kitchen, Director, Assisted by Mrs E Harding**

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed; and
2. The respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £10,831.80; and
3. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply; and
4. The claimant succeeds in his claim for breach of contract in respect of his notice period but is awarded no compensation; and
5. By consent the claimant succeeds in his claim for accrued but unpaid holiday pay and the respondent is ordered to pay the claimant the agreed sum of £230.67.

RESERVED REASONS

1. In this case the claimant Mr Jon Bryan claims that he has been unfairly constructively dismissed, and he also brings claims in respect of his lost notice period and for accrued but unpaid holiday pay. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable. The respondent also denies the notice pay claim, but the accrued holiday pay claim is now agreed.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which I was referred are in a bundle of 95 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard from Mr William Kitchen who is a director of the respondent company on behalf of the respondent.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. <u>The Facts:</u>
6. The respondent Grace Road Commercial Services Ltd is a small family company which provides a commercial tyre service. It was based in Exeter with branches in Barnstaple and Torbay. The claimant Mr Jon Bryan commenced employment with the respondent in 1994, and at the time of his resignation with immediate effect on 18 August 2020 he held the role of manager in the Barnstaple depot and had 24 years of continuous service. He lived in Barnstaple and he was a valued employee. Unfortunately, the Barnstaple branch of the respondent's business started to become commercially unviable, and it was clear during 2019 that the closure of the Barnstaple branch was becoming likely. It seems that the parties had initial outline discussions about the claimant taking on the business, but these were not fruitful. The respondent then took the decision to close the Barnstaple branch in March 2020, and this then coincided with the Covid-19 pandemic and the national lockdown.
7. The respondent then took advantage of the Government furlough scheme, and the parties agreed that the claimant would take furlough leave from 30 March 2020 on 80% of his salary. The claimant's understanding was that this was pending confirmation of his potential redundancy, but at no stage did the respondent give formal notice to the claimant that his employment was redundant, and the respondent did not start any consultation process with regard to potential redundancy on that basis.
8. By letter dated 1 June 2020 the respondent wrote to the claimant to confirm an offer of alternative employment following the closure of the Barnstaple site. This was an alternative job on the same salary and terms and conditions, but it was based in Exeter which is a long commute from Barnstaple. The offer was expressed to be open for seven days.
9. The claimant responded by letter dated 13 June 2020, which was sent recorded delivery but (presumably because of the pandemic) was not delivered until 24 June 2020. The claimant concluded that the new role was not suitable because the sites were 58 miles apart, and the new role required a significantly different skill set because of its suggested focus on sales. The claimant said he was not in a position to accept or decline the role and asked that the respondent provided some clarity as to the closure of the Barnstaple site. He suggested that the legal different definition of redundancy had been met and sought confirmation that the situation should be "handled as a redundancy situation".
10. The respondent replied by letter dated 24 June 2020. It was clear that Mr Kitchen had considered the claimant's concerns about his potential new role and suggested that the respondent could transfer stock to the Barnstaple depot to allow the claimant to start work in the local area. It also confirmed that the hours would be flexible. This letter did not confirm as requested by the claimant that any redundancy process was underway, even

though it confirmed the closure of the Barnstaple depot and referred to "continuing this consultation process with you to retain your employment with us …"

11. The claimant replied by letter 28 June 2020 to the effect that he appreciated the respondent had considered the points he had raised about the new role and that flexibility and training were on offer, but he went on to raise concerns that the respondent had simply not dealt with his main concern. This was effectively that the Barnstaple depot was now closed, that the legal definition of redundancy had appeared to have been met with regard to claimant's employment, and again seeking formal confirmation that his position was redundant, and that the consultation process should be commenced on that basis.
12. Meanwhile the respondent had leased its Barnstaple depot premises to a car wash business. This was a different business with different customers, and neither party seeks to argue that the TUPE Regulations apply.
13. The respondent replied by letter dated 3 July 2020, which gave further information about the financial difficulties which had led to the closure, and their previous discussions about the claimant taking on that aspect of the business. However, that letter did not answer the claimant's concerns, and still did not confirm that the claimant's position was redundant. The respondent stated: "We feel from the direction of your letters that you do not want to remain employed or to work at all? If this is the case and you are planning to terminate your employment with us we would ask for your reasons for rejecting the new role we have offered to you to remain employed."
14. The claimant responded by letter dated 12 July 2020. He refuted the conversation about starting up his own business and complained as follows: "I have asked two questions that you have now failed to respond to on each of the two separate occasions that I have asked: (1) please clarify why you are not treating this situation as a redundancy situation given that the situation falls exactly into the legal definition of redundancy; (2) please explain what it is that you are "consulting" with me on and provide clarity around how you see the process concluding?" The claimant went on to state: "I have explained twice now that I am unable to make a decision as to whether to take the new role or not until I know why this has not been handled as a redundancy situation" and "to summarise I feel it is clear that you are attempting to force me into a resignation. I have no intention of resigning, as I'm sure you will be aware, if the business wants to dismiss me then they would need to do so under one of the five fair reasons for dismissal as detailed in employment law."
15. The respondent replied by letter dated 27 July 2020 inviting the claimant to attend a meeting in Exeter on 5 August 2020. The suggested aim was to discuss the content of the claimant's letter. The respondent did not state that it was commencing a formal consultation process with regard to prospective redundancy. The letter also stated: "We are not obliged to permit you to bring anyone with you to this meeting, but should you prefer to, we are only able to allow a senior member of staff who you should notify us of prior to your arrival, they will not be able to contribute in any way within the meeting but may take notes for you."
16. The claimant replied by letter dated 31 July 2020. The claimant complained that the purpose of the meeting was unclear, and it did not comply with his legal right to be accompanied by a fellow employee or trade union representative, and that any representative should be allowed to address the meeting in accordance with ACAS guidelines. The claimant concluded: "Due to all the above points I feel that your approach to this meeting is unfair and intimidating and I do not wish to attend to be intimidated or bullied. At this stage I feel frustrated that I have asked many questions over these last few months and the only way you will appear to answer them is at a one-sided meeting." He also confirmed that he was discussing a potential claim against the respondent with ACAS.
17. The respondent did not reply to that letter. Nearly three weeks later by letter dated 18 August 2020 the claimant wrote to resign his employment. He confirmed that he was resigning with immediate effect because he had been advised by ACAS that to pursue an employment claim he either needed to have been dismissed by his employer, or he would need to resign to claim constructive dismissal. He concluded by stating: "The reasons behind my wishing to raise a claim were detailed in my previous letters but to clarify despite many occasions over the past few months requesting further clarity around how my

employer was handing the closure of the Barnstaple depot, I got no answers and feel that the whole situation has been handled in an unfair and intimidating way. I now feel this constitutes a fundamental breach of trust and confidence and leaves me with no option but to resign and pursue a constructive dismissal claim."

18. This resignation letter crossed in the post with a letter dated 24 August 2020 from the respondent to the claimant purporting to require him to return from furlough leave with effect from 1 September 2020. That letter set out new terms of employment for the claimant which included a week's training in Exeter, and thereafter being based largely at Barnstaple. The claimant has conceded that the terms of this proposed employment would have amounted to a reasonable alternative offer. However, that letter still did not address the previous concerns raised by the claimant, and by the time he had received it the claimant had already concluded that there was an irretrievable breakdown in trust and confidence between them, and he had already resigned. It was then followed by letter of 1 September 2020 from the respondent accepting the claimant's resignation with immediate effect as of 18 August 2020, and the respondent also offered to investigate any formal grievance in accordance with the respondent's policy.
19. At no stage during this process, which included discussions between the parties and their exchange of correspondence, did the respondent ever confirm to the claimant that his employment was redundant and/or that it was commencing a formal consultation process with regard to the claimant's prospective redundancy. Despite the claimant's repeated requests for clarification of when and how a redundancy process might commence, at no stage did the respondent do this, nor did it confirm to the claimant what his statutory redundancy pay and statutory/contractual notice pay might amount to in the event of redundancy, so that the claimant might have the opportunity of considering this in the round along with the offer which had been made of potential alternative employment.
20. The claimant commenced the early conciliation process with ACAS on 11 September 2020 (Day A), and the ACAS Early Conciliation Certificate was issued on 11 October 2020 (Day B). He presented these proceedings within time on 6 November 2020.
21. Finally, with regard to the claim for accrued holiday pay, the parties have now agreed that on the termination of his employment the claimant was paid his correct accrued holiday pay of 13 days, but only at the reduced furlough rate of 80% of his normal pay, when he was entitled to his full pay. The difference is agreed at £230.67 and the respondent now concedes that this sum is due and owing to the claimant.
22. Having established the above facts, I now apply the law.
23. The Law:
24. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
25. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
26. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
27. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Omilaju v Waltham Forest

London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; Wright v North Ayrshire Council [2014] IRLR 4 EAT; Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.

28. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
29. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
30. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
31. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
32. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

33. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
34. Decision:
35. This is a sad case in which the parties were unable to resolve their differences despite the fact that they had known each other for a long time. The respondent is a small employer, and the claimant was a trusted employee of the respondent of 26 years standing. The probability was that the respondent would have to close its business in Barnstaple where the claimant worked, and the decision was brought forward by the Covid-19 pandemic.
36. The respondent's view in short is that it discussed options with the claimant, and when it tried to adopt a more formal consultation process for some reason the claimant became unco-operative and declined to take part. The respondent asserts that it offered reasonable alternative employment to maintain the claimant's employment in difficult times, and that the claimant had no grounds to reject that offer, and no grounds to conclude that he was the victim of any aggressive or untrustworthy behaviour on the part of the respondent.
37. On the other hand, the claimant's view is that there was a clear redundancy situation, and despite repeated requests the respondent never confirmed the seemingly obvious to the claimant, namely that his role was redundant and what his potential options were. The claimant repeatedly asked for confirmation that a formal redundancy process should be commenced and was never given the option of a redundancy payment on notice, which he could have weighed in the balance to consider against any offer of alternative employment, and whether any such offer might have been reasonable. In the event, and at the third attempt, the respondent did make an offer of alternative employment which might well have been acceptable, but by that late stage the claimant already resigned because trust and confidence between them had been irrevocably damaged.
38. Some aspects of the respondent's conduct were commendable in that Mr Kitchen had discussions with the claimant about whether he might wish to take on the business in Barnstaple in a personal capacity, and he was prepared to offer alternative employment in Exeter in the hope that the claimant's employment could be maintained, and any potential redundancy avoided. However, in my judgment the respondent was putting the cart before the horse. The claimant repeatedly requested confirmation of what his position was with regard to potential redundancy. He complained that this had not been confirmed and asked for a more formal process within which to address it. That request was repeatedly evaded by the respondent. In my judgment the respondent should have confirmed to the claimant that his role was redundant; the extent of his potential statutory entitlement by reason of statutory redundancy pay and statutory notice pay; and what alternative employment was available which the claimant might then have considered. In my judgment the claimant was entitled to conclude that the respondent was being evasive and unwilling to meet his statutory employment rights, and the respondent is not in a position to argue that the claimant was being unreasonable in refusing suitable alternative employment when the respondent had repeatedly failed to commence a formal redundancy process and failed to put any such offer in the context of a reasonable consultation process.
39. The claimant had taken advice and asked repeatedly in his correspondence for confirmation from the respondent that there should be a redundancy process underway and how this might proceed formally. When the respondent failed to concede what in my judgment was obvious and inevitable, the claimant was entitled to conclude that the trust and confidence between them had been damaged if not destroyed by the respondent without reasonable or proper cause. The ultimate offer of alternative employment was something which the claimant might well have found acceptable, and the respondent might

well have had an argument that any redundancy payments need not have been made on the basis that the refusal by the claimant was unreasonable. However, by the time that offer was made the claimant already resigned his employment.

40. I find that there was a fundamental breach of contract by the respondent, namely a fundamental breach of the implied term that an employer will not act without reasonable or proper cause in a way which is intended or likely to damage or destroy the trust and confidence between employer and employee. The claimant resigned reliant upon that breach, and he did not delay unduly in doing so. I find that the claimant's resignation can be construed to have been his constructive dismissal, and that therefore the respondent dismissed the claimant without notice with effect from 18 August 2020.
41. The respondent has not sought to argue that there was a dismissal which was fair for one of the potentially fair statutory reasons. To the extent that redundancy is relied upon as a potentially fair statutory reason, the respondent's actions were not fair and reasonable because it failed to confirm the potential redundancy and failed to confirm the claimant's potential redundancy rights, and it failed to consult on that basis. In my judgment the actions of the respondent were not fair and reasonable in all the circumstances of the case, and the dismissal was not within the band of reasonable responses which were open to the respondent when faced with these facts.
42. Accordingly, I conclude that notwithstanding the size of small administrative resources of this employer, the respondent's actions were not fair and reasonable in all the circumstances of the case, and the claimant was unfairly dismissed.
43. Remedy/Compensation:
44. The claimant does not seek reinstatement or re-engagement.
45. The claimant seeks compensation for his unfair dismissal. His basic award is calculated as follows. At the effective date of termination of his employment on 18 August 2020 the claimant was aged 44 and had completed 26 years of employment. The correct multiplier under the statutory scheme is 21.5 weeks' pay. The claimant's gross weekly pay was £434.58. The basic award is therefore £9,343.47.
46. The claimant was successful in obtaining alternative employment which he commenced one month after the date of termination of his employment. His net monthly pay was £1,488.33 per month. Thereafter he fully mitigated any ongoing loss. The claimant only seeks the sum of £1,488.33 by way of his compensatory award, and I make that award.
47. Total compensation for unfair dismissal is therefore £10,831.80, and the respondent is ordered to pay the claimant the sum of £10,831.80 as compensation for his unfair dismissal.
48. The claimant seeks an uplift on his compensation pursuant to s. 207A(2) on the basis that the respondent failed to apply the appropriate procedure. I decline to award any such uplift, not least because the ACAS Code does not apply to redundancy procedures, but secondly because the respondent is a small employer who did try to consult and ultimately was able to make an offer of alternative employment which the claimant would have found acceptable (but for the fact he had already resigned at that stage). I do not consider it to be just and equitable to apply any uplift in the circumstances.
49. The respondent also seeks a reduction on any award pursuant to s. 207A(2) on the basis that the claimant failed to exercise a formal grievance. Again, I decline to reduce any award because I do not think it would be just and equitable to do so, in circumstances where the claimant's correspondence can be read as a repeated informal grievance which the respondent failed to address.
50. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
51. With regard to the claim for wrongful dismissal and the lost notice period of 12 weeks, the claimant obtained alternative employment after one month at a rate sufficient to mitigate any ongoing loss. He has already been compensated for this one month's loss within the compensatory award above, and I decline to award any further compensation for the lost notice period because it has either been compensated for already, or otherwise fully mitigated.

52. Finally, the claimant's claim for accrued but unpaid holiday pay succeeds by consent in the agreed sum of £230.67 for the reasons set out above.
53. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 21; a concise identification of the relevant law is at paragraphs 24 to 33; how that law has been applied to those findings in order to decide the issues is at paragraphs 35 to 42; and how the amount of the financial award has been calculated is at paragraphs 45 to 52.

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Employment Judge N J Roper
Dated 24 May 2021

Judgment sent to Parties on
08 June 2021
By Mr J McCormick

For the Tribunal Office