



# EMPLOYMENT TRIBUNALS

**Claimant: Mr J Dignam**

**Respondent: The Cracking Egg Company Limited**

## REASONS

(requested by the claimant on 9.7.21)

1. These are the written reasons for the Tribunal's Judgment dated 2 July 2021 and sent to the parties on 7 July 2021, upholding the claims of constructive unfair dismissal, wrongful dismissal, and disability discrimination pursuant to sections 13 and 15 of the Equality Act; and dismissing all other claims.
2. By a claim form presented on 4 December 2018, the claimant brought complaints of constructive unfair dismissal; wrongful dismissal; disability discrimination and failure to give written reasons for dismissal. All claims were resisted by the respondent.

### Application to amend claim

3. At the start of the hearing, the tribunal heard the claimant's amendment application. The application, made on 27.4.21, was to add 4 fresh allegations of discrimination. These are set out at paragraphs d-g of the application. This was opposed by the respondent.
4. After hearing arguments from the parties and having considered the factors in Selkent Bus v Moore [1996] IRLR 661, the application was refused. The claimant claimed the amendments arose because of documents that came into his possession on 20.12.18. This was a couple of weeks after his original claim was presented and 28 months before the application to amend was made. The claimant had ample opportunity to make his application earlier. There have been a number of case management hearings in this case, in particular, one on 11 June 2019, at which the issues in the case were identified. That would have been an ideal opportunity to raise these additional matters. The claimant has not provided an adequate explanation for not doing so. Turning to the balance of prejudice between the parties, we consider that this weighs against granting the application. Requiring the respondent to respond to fresh allegations so late in the proceedings and many years after the original events would be highly prejudicial. On the other hand, denying the application would not deprive the claimant of a remedy as he had a number of extant discrimination claims.
5. The claimant gave evidence. We also heard on his behalf from Richard Neal (RN) the claimant's civil partner. On behalf of the respondent we heard from Chris Rance (CR) Director; Rory Bartlett (RB) Operations Manager and; Rebecca Plank (RP) Manager. We were provided with a bundle of documents from the respondent running to The

respondent provided an electronic bundle of documents running to over 909 pages. The claimant provided a separate bundle running to 226 pages. References in the judgment in square brackets are to the pdf numbers from the respondent's bundle unless indicated otherwise by the prefix "C", in which case it is the claimant's bundle.

### The Issues

6. The issues are set out at in the case management summary of EJ Gray dated 11.6.19 and are referred to more specifically in our conclusions [ 59-62 ]

### The Law

#### Constructive dismissal

7. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.
8. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.
9. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

#### Direct Discrimination

10. Section 13 Equality Act 2010 (EqA) provides that: A person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

#### Indirect Discrimination

11. Under section 19 EQA, where A applies a provision, criterion or practice (PCP) to B , it is discriminatory in relation to the protected characteristic (in our case disability) if:
  - a. A applies or would apply the PCP to persons who do not share B's disability
  - b. It puts or would put persons with B's disability at a particular disadvantage compared with persons not of having his disability.
  - c. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Discrimination arising in consequence of disability

12. Section 15 of the EqA provides that a person (A) discriminates against a disabled person (B) if –
  - a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
13. Under the Code of Practice on Employment, the definition of something arising in consequence of employment includes anything which is the result, effect or outcome of a disabled person's disability.

Failure to make reasonable adjustments

14. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.
15. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

Findings of Fact

16. The claimant was employed as a support administrator at Esquire Coffee Shop (the Coffee Shop) which was a franchise initially owned by a company called Medina Management Ltd. The directors of the company were Andrew Bevington and RN, the claimant's civil partner. Andrew Bevington resigned as a director in August 2014.
17. The claimant's role involved serving beverages and snacks, cleaning, ordering and other administrative tasks.
18. The claimant's contract of employment dated 8 May 2015 provided for normal working hours of 16 per week. [C14]
19. The claimant has Type 1 diabetes and this requires him to inject himself regularly with insulin. The respondent has conceded that at the relevant time, the claimant was disabled pursuant to section 6 EqA. Due to his diabetes, the claimant found working beyond 12.30pm difficult and so was routinely placed on the early morning shift. When he felt able to, he sometimes worked additional hours in the afternoon, though those hours were not guaranteed.
20. In December 2017, Medina Management Ltd went into administration and the franchise was taken over by Awesome Coffee Limited on 2 February 2018. RN was the sole director and owner of Awesome Coffee Company so the coffee shop effectively remained in the same hands.

21. On 2 July 2018, the franchise was sold to the respondent. The respondent accepts that the transaction was one to which the TUPE regulations applied though they contend that the claimant did not transfer. The respondent's position in the ET3 response, and one which they maintained up to the hearing was that the claimant had agreed not to transfer.
22. In May 2018 as part of the pre-contract negotiations, there was a meeting between RN, CR and RB. The events of that meeting are in dispute. CR and RB contend that at that meeting, RN told them that the claimant would be leaving the business with him upon the transfer. The claimant was not present at this meeting yet the respondent contends that this amounted to him exercising his right to object to the transfer pursuant to regulation 4(7) of the TUPE regulations. RN does not accept this account and denies making any such statement about the claimant's continued employment. RN contends that he supplied them with details of his employees, including the claimant, and RB wrote them down.
23. The sale agreement between the parties dated 2 July 2018 contains within schedule 1 a list of employees transferring to the respondent. It lists 8 employees in total and the second name on the list is the claimant's [555]. The sale agreement was signed by CR. The respondent contends that the claimant's name was included in error. We do not accept this. The respondent was represented in relation to the purchase by Terry Fendt of Sherrards Solicitors [497] The agreement would have been scrutinized, by the solicitors and if there had been an error, CR would have drawn it to the solicitors' attention and it would have been corrected.
24. In his oral evidence, RB said that he had a conversation with RP, in early June and that they discussed the staff individually. RP had worked at the café since 2014 and was to take on the role of manager upon transfer. When asked whether they discussed the claimant, RB said that he could not recall. He then changed his evidence and said that he believed he told RP that the claimant would not be transferring. We do not accept that evidence. It is not in RB's statement or that of RP. RP also made no reference to it in her oral evidence either.
25. At paragraph 16 of her statement, RP says that on 2 July, the day of the transfer, she was asked by RB to re-do the rota and to deploy the staff team. The claimant was on the rota. If she had been told that the claimant was not transferring, she would not have added him to the rota. Equally, RB would have instructed her to remove him from the rota, which he did not do.
26. On 29 June, RB sent an email to RN, cc'd to all transferring staff asking them to provide ID on Monday so that they could be set up on the payroll. The claimant was included in the distribution list. [C38]
27. At paragraph 17 of his statement, RB says that he met with the claimant on 3 July [ the day after the transfer] to inform him of his working schedule. The claimant informed RB of his diabetes and that he was restricted to working until 12.30pm each day due to fatigue. The claimant says the conversation took place on 2 July but either way, it is inconsistent with him not transferring.
28. Later that afternoon the claimant went home unwell and subsequently sent in a sick note and requested a meeting. That sick note identified the claimant's condition as Anxiety

and Gastric ulcer and signed him off until 6 August 2018 [ 565 ] On 11 July, RB responded stating that he was happy to meet with the claimant and also stating that his role had not changed. That is inconsistent with him not having transferred [564-566]

29. RB met the claimant on 20 July and made a note of their discussion. He records at the end of the note that the claimant will be fit to return on 6 August as per doctor's note [570] That is inconsistent with the claimant not having transferred.
30. For all the above reasons, we prefer the account of RN and find on balance of probabilities that he did not inform the respondent that the claimant would be leaving the Coffee Shop.
31. It is worth noting that even if we had found otherwise, the respondent could not have relied on this as the claimant objecting to the transfer. Any objection had to come from the claimant himself and the respondent accepts that they did not receive any objection from him.
32. Returning to the 2 July, at 19:02, RP emailed the staff with the rota for the following day's shift. The claimant was put on a shift from late morning shift/mid-afternoon shift, which was not his normal shift. RP had worked with the claimant since 2014 and knew that he had always worked the early shift as a way of controlling his diabetes. RP accepted in evidence that where a shift is changed at short notice it would be normal practice to contact the individual in advance to make sure that they were available. No such contact was made with the claimant.
33. On 26 July, RB sent an email to RN - copied to CR - dealing with a number of post-transfer matters. The 6<sup>th</sup> bullet point refers back to the May meeting and asserts that they were told the claimant would not transfer. It refers to the claimant being off sick, that he will not receive SSP and will not be required to work any further at the coffee shop [ 575 ] It is clear that at this point that the respondent had decided not to honour the claimant's contract of employment.
34. On 1 August at 8.50am, the claimant sent RB his fit note and bank details. The fit note declared him fit to return to work but stated that because of his diabetes, he should be restricted to mornings only. [C107]
35. On the same day at 13.03, RB wrote to RN, cc'd to CR, asking him to ensure that the claimant was clear that he would not be working any further at the Coffee Shop [581]
36. On 2 August at 8.25am, the claimant emailed RB asking him whether he still had a job. AT 10.11 on the same day, RB responded, asking the claimant to speak to RN regarding his employment status, referring to the alleged conversation in May [586]
37. On 3 August, CR rang RN seemingly to complain about the situation regarding the claimant. He referred to buying the assets not the people and to people going off sick that had nothing to do with him. He also referred to wanting complete flexibility and not wanting the claimant or anyone else deciding when they could come into work. That account was set out at paragraph 99 of RN's statement. CR told us that he did not recall having the conversation. However, we do not think RN would have made this up and we accept his account as it is consistent with the respondent's general attitude towards the claimant.

38. The respondent did not provide the claimant with any shifts or pay him for any shifts once he was declared fit to return to work.
39. On 30 August 2018, the claimant wrote to the respondent requesting a statement of why he had been unfairly dismissed and why he had not been paid. He also asserted that he was protected by the Disability Discrimination Act (clearly a reference to its successor, the EqA) [590] The respondent did not reply.
40. After unsuccessful attempts to clarify his employment status, the claimant wrote to the respondent on 3 December 2018 stating that he considered that he had been dismissed but in the alternative was resigning with immediate effect due to the respondent's breach of his contract [ 608-609 ]

#### Submissions

41. The parties made oral submissions which are summarised briefly below:

#### Respondent

42. It was submitted by the respondent that the dispute has arisen because of the agreement made in May 2018 that the claimant would not transfer. Their actions were based on the mistaken belief that RN could object to the transfer on the claimant's behalf. They now accept that is not the case. They signed the Transfer agreement relying on the due diligence of Sherrards. They genuinely believed the claimant would not transfer. The respondent's actions were not related to the claimant's diabetes. They were based on the agreement that the claimant would be leaving. CR knew of the claimant's diabetes on 3 July. The claimant was not supposed to be working and the change to his shift was an attempt to maintain his 16 hours. The respondent did not act out of malice. The respondent has employed 2 diabetic employees and made adjustments. Also, RP has Crohn's disease. The claimant was involved in the business and recognised as an owner. The respondent needed a completely new face which is why it made the agreement with RN. It is the respondent's failure that this was not put in writing.

#### Claimant

43. It was submitted by the claimant that there was no evidence of any offer of work. His Fit certificate contained a restriction that he could only work mornings. The claimant had regularly worked early morning shifts since 2013. On 2/7 it was changed to late morning/mid afternoon. RP had worked with the claimant since 2014 and was fully aware of the potential health risks to the claimant. RB's letter of 2 August is disingenuous. The respondent has not submitted any evidence that the constructive dismissal was fair and admitted in oral evidence that they did not use ACAS procedure during the dismissal process. Their reasons are trivial based on a mythical conversation with someone who was not entitled to resign on the claimant's behalf. The respondent's explanation is not credible. They had access to Croners and Sherrards. The claimant's comparators for the direct discrimination claim were the other employees that transferred. The claimant was the only one that was disabled and the only one singled out as not transferring. The claimant was constructively dismissed by reason of disability. CR had a lack of knowledge on issues of diversity even though he is the senior person in the organisation and should know about the policies and procedures in the operations manual.

Conclusions

44. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues

*Did the claimant transfer to the respondent under TUPE?*

45. The respondent accepts that TUPE applied to the purchase of the shop and that in principle all those employed at the time of the transfer would go across. The sole reason for the respondent asserting that the claimant did not transfer was because they say that he objected to the transfer. Reg 4(7) requires that such objection must be made to the transferor or transferee in clear unambiguous terms before the relevant transfer.
46. Both the claimant and RN say that no objection was made. The evidence of the respondent was that no objection was made by the claimant himself. Their reliance on conversations between RN, CR and RB in May is misplaced because, as has now been accepted by the respondent, RN could not object to the transfer on behalf of the claimant. We find that the claimant did not exercise his right to object to the transfer and therefore transferred to the respondent under TUPE.

*Failure to provide the claimant with work of 30 hours a week*

47. This allegation assumes that the claimant was entitled to be paid for 30 hours a week. However we have found this not to be the case. The claimant's contractual hours were 16 per week. That he sometimes worked more hours does not change this. Those additional hours were voluntary and not guaranteed. The claimant acknowledges the contractual position in his resignation letter where he states: "*During this time you have completely failed to acknowledge me as an employee. This is a breach of my contract (which is to work 16 hours per week).....*"[609] However, we do accept that from 2 August (the day after the respondent received confirmation of the claimant's fitness to work) the respondent should have provided the claimant with work/pay for 16 hours. The respondent says that the reason for failing to do so was because of their mistaken belief that the claimant had agreed not to transfer. For the reasons stated at paragraphs 22-30 above, we do not accept that there was a mistaken belief. We find that there was no reasonable or proper cause for the respondent's actions and we therefore conclude that their failure to pay the claimant for 16 hours work per week from 2 August amounted to a fundamental breach of his employment contract.

*Changing the claimant's working hours*

48. This is a reference to the matters at paragraph 32 above. RP changed the claimant's shift at short notice, without checking his availability, as was the norm. RP has provided no explanation for not doing so in the claimant's case. The reason she changed the shift was not for operational reasons, it was motivated by a desire not to have RN on the premises as he had apparently indicated that he would assist the claimant in opening up the shop. The manner of the change without consultation, explanation or reasonable cause was likely to destroy or seriously damage the relationship of trust and confidence.

Breach of mutual trust

49. This is a reference to the matters at paragraph 25 a) d) and e) of the particulars of claim [26]. We do not consider that these add much to the breaches referred to above. They are not new conduct matters, they are a sub-set of the existing conduct. We are satisfied that the above matters cumulatively amount to a breach of trust and confidence entitling the claimant to treat his employment as at an end

Did the claimant resign in response to the breach?

50. The claimant's reason for resigning is summarised in the final paragraph of his resignation letter [609]. That is consistent with the case presented before us. We are satisfied that the claimant resigned in response to the breach.

Did the claimant delay in resigning

51. The claimant states in his resignation letter that he treated the breach of trust and confidence as having occurred on 2 August 2018. However, he did not resign until 4 months later. In determining whether the claimant affirmed the contract, it is necessary to look at what was happening during this period. It is clear from the claimant's correspondence with the respondent from 30 August onwards that he was unclear as to his employment status. He believed that he had been dismissed but sought confirmation of this but the respondent would not engage with him. Any delay in the claimant's resignation was because of the respondent's failure to clarify his employment status. We do not think that the delay was unreasonable in the circumstances or that the contract was affirmed.

Conclusion on constructive dismissal

52. In light of the above, we find that the claimant was constructively dismissed.

Was the dismissal fair

53. It is for the respondent to show that dismissal was for one of the potentially fair reason set out in section 98(2) ERA. The reason the respondent relies on for the dismissal is their mistaken belief that the claimant had not transferred to them under TUPE and was therefore not their employee. The Tribunal has already rejected the existence of such a belief. The respondent has not satisfied us that there was a potentially fair reason for the claimant's dismissal and it therefore follows that the dismissal was unfair.

Direct Discrimination

54. The less favourable treatment relied upon are the letters to RN of 26.7.18 [575] and the letter of 2.8.18 to the claimant [586] and, in the alternative, the claimant's constructive dismissal. In considering whether there are facts from which the Tribunal could conclude, in the absence of other explanation, that discrimination had occurred, we note that the respondent's conduct on transfer indicated that it accepted that the claimant was its employee. This was still the case on 20 July following RB's meeting with the claimant (para 29 refers) At that meeting, the claimant told RB that he could not work beyond 12.30pm because of his diabetes. However, by 26 July the respondent's position had completely changed and RB, for the first time, asserted in correspondence



to RN that the claimant was not their employee [575]. This was then repeated in an email to the claimant on 2 August [586]

55. We have asked ourselves what intervening event occurred between the 20-26 July that led to the respondent's change in position and the answer is found in RB's oral evidence. He told us that he had to let CR know about the claimant's disability and his inflexibility. We believe that disclosure occurred within this window and that was the reason for the change in position. We are satisfied that the disclosure to CR was the reason for the change in position. In addition, the conversation between CR and RN, referred to at paragraph 37 above demonstrates a hostility towards employee sickness generally and specifically the claimant's sickness. We have drawn inferences of discrimination from these matters and are therefore satisfied that the burden shifts to the respondent to provide an explanation for its actions. Their explanation – that they mistakenly believed the claimant had not transferred – has already been rejected. In the absence of any other explanation, we find that when the decision was made not to treat the claimant as employed, it was not because of a belief that there was an agreement, it was because of his diabetes and the inflexibility caused by it. We find that the claimant was constructively dismissed because of his disability. The direct discrimination claim succeeds.

Indirect discrimination and failure to make reasonable adjustments

56. The claimant has not identified a proper PCP in relation to his section 19 and 21 claims. The stated PCP is "*requiring the claimant to work in the afternoons*". That is not a neutral provision, criterion or practice but is specifically about him. Without a proper PCP, these claims cannot succeed.

Discrimination arising from disability

57. The unfavourable treatment relied on is the same conduct as for the direct discrimination claim. We consider that part of the reason for the claimant's dismissal was because the respondent did not want to employ someone who could not be flexible. The claimant's lack of flexibility was in consequence of his disability.

Was it a proportionate means of achieving a legitimate aim

58. In the Tribunal's case management order of 11 June 2019, it is recorded that the respondent would clarify its legitimate aim. As far as we are aware, they never did so and has certainly made no reference to the legitimate aim in their submissions. There has also been no evidence or submissions presented on the issue of proportionality. In the circumstances, we find that this claim succeeds.

Wrongful Dismissal

59. The Tribunal has found that the claimant's resignation amounted to a dismissal. That dismissal was without notice. The claimant was contractually entitled to receive statutory notice of termination. The wrongful dismissal claim succeeds.

Failure to provide written reasons for dismissal

60. This is based on the claimant's request in his letter of 30 August [590] and is predicated on the claimant having been dismissed on 2 August 2018. At the case management

hearing on 11 June 2019, the claimant confirmed that he was no longer asserting that he was dismissed on 2 August 2018. We are satisfied that the dismissal took effect on 3 December upon the claimant's immediate resignation. As there was no request for written reasons for dismissal following that resignation, this claim must fail.

Employment Judge Balogun  
Date: 8 November 2021