EMPLOYMENT TRIBUNALS

Claimant: Mr Keith Ward

Respondent: Stonegate Pub Company Limited

Heard at: Birmingham Employment Tribunal via Videolink (CVP)

On: 23 & 24 November 2020

Before: Employment Judge J Jones

Representation

Claimant: in person
Respondent: Ms G Rezaie (counsel)

RESERVED JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

Background

1. By a claim form lodged on 8 July 2019, following a period of conciliation through ACAS between 31 May and 11 June 2019, the claimant complained of constructive unfair dismissal following his resignation on 11 March 2019 from his position as a pub General Manager.

2. The claimant's case was, in summary, that he was left with no choice but to resign by the respondent's conduct in transferring him to a new pub following a period of sick leave and making personal comments about him in an email between managers about the transfer that led to a total breakdown in the trust and confidence between the parties.

3. The respondent denied dismissal, relied on an express mobility clause in the contract of employment regarding the move of site and asserted that it

had behaved appropriately at all times towards the claimant in the context of his poor performance.

4. The claim was prepared via standard directions issued by the tribunal and took place over 2 days via videolink.

5. There was an agreed bundle of documents running to 268 pages. References in these reasons to page numbers are references to the pages of that bundle, unless otherwise stated.

6. The claimant gave evidence in support of his case and called no other witnesses. The respondent called Mr Curtis Buck, Territory Area Manager for the Midlands, Mr Paul Wright, Director of Licensing and Mr Matthew Brown, Operations Director for the Midlands, to give evidence.

7. Based on this evidence, the tribunal made the following findings of fact.

The Facts

8. The respondent is a leading pub company with over 750 sites in the UK and over 15,000 employees.

9. The claimant commenced employment for the respondent (which expression includes its predecessor as owner of some of the pubs, Mitchells & Butler) on 22 October 2002. By March 2003 he had been promoted and became the General Manager of the Station pub in Sutton Coldfield ("the Station"). This pub was situated next to the train station in the centre of town, with a large outdoor area and function room upstairs.

10. The claimant was proud of his achievements as General Manager at the Station over the 15 years that followed, when it became one of the respondent's most profitable sites and won a number of awards. The claimant had used the function room to good effect booking comedy acts and hosting comedy nights there which he compered himself. He had even installed his own PA system there, unknown to the respondent. Many of his friends were regulars at the pub and he had become a big personality associated with the venue. The tribunal noted that even the claimant's email address described him as "stationmasterkeith." It was clear to the tribunal that the claimant was emotionally invested in the Station which had become integral to his identity.

11. The terms of the claimant's employment were set out in a contract of employment signed by him on 28 February 2003, with Six Continents Retail Limited (pages 31-38).

12. This stated that the claimant's "initial place of work" was the Station and included the following mobility clause:

    "25. <u>TRANSFERS</u>

> Managers who plan a career with the Company should expect to transfer during their employment. Planned transfers of Managers to other outlets:
>
> a. Form part of an individual's personal career development
> b. Have been seen to improve the overall performance of the Company.
>
> The Company will use all reasonable endeavours to obtain mutual agreement to transfer having full regard for all the Manager's personal and domestic circumstances.
>
> The Company has the right to require the Manager to transfer to another Managed House, the Manager shall also have the right to make application for a transfer to another Managed House or appointment to other employment within the Company. Appointment to such transfers, whether at the request of the Company or of the Manager, shall be determined by the Company according to the circumstances of each particular case."

13. It was quite common for managers to be relocated to different sites, both for their own personal development to give them experience of managing different types of establishment, and also to fulfil the needs of the business. It was very unusual for a manager to stay at one site for as long as the claimant had been at the Station by the time of the events which formed the subject matter of his claim.

14. The respondent's managing director was Nick Andrews. He lived near to the Station and often visited during the good weather to take advantage of the garden area. When Matthew Brown joined the business in January 2018 as Operations Director for the Midlands region, Mr Andrews drew his attention to the Station as being a profitable pub for the area but one that had been recently underperforming. Mr Andrews mentioned that he had observed that the venue could be understaffed on busy days, the claimant was absent during peak shifts and that the outdoor bar was not consistently open. Mr Brown accordingly had the performance of the Station on his radar from the commencement of his employment.

15. Mr Brown visited the Station and met the claimant in approximately February 2018. They had a candid conversation during which the claimant explained that he was looking to progress in his career having achieved all he could as a General Manager. He told Mr Brown that he had recently gone through a difficult marriage breakup and that his head was "not in the business" and he had lost some direction. Mr Brown raised the possibility of putting the claimant on the "Aspirations" scheme which was a 14 month training programme to help general managers transition into multi-site management. Other career opportunities within the respondent were discussed with the claimant but he was non-committal in his response to Mr Brown's ideas.

16. The claimant told the tribunal that he was going through a very difficult period in his personal life at this time and was struggling to juggle work with his caring responsibilities for his seven-year-old son.

17. The claimant's area manager at the beginning of 2018 was Andrea Strathmore. During the first half of 2018 there were a series of issues which arose between the claimant and Ms Strathmore which led to a breakdown in their working relationship. This coincided with the continued and growing concern within the respondent business about the poor performance of the Station. Ms Strathmore found the claimant resistant to her feedback and suggestions of ways to improve the performance of the Station and the claimant experienced Ms Strathmore as unsympathetic and unhelpful.

18. The respondent's financial year ran from 1 October to 30 September and was broken down into 13 four-week periods. By June 2018 the Station was below target in every performance area that was measured by the respondent (page 104). Profit was down by nearly £70,000, sales were down by over £129,000, labour costs were up by 1.2% and team turnover had increased by 50% to 135%. The site had an overall internal score of 3/12 as a consequence of these key performance indicators.

19. As a result of the performance issues at the Station the respondent's senior management decided to include it within the respondent's "Hot 100" programme. This was a programme which identified poorly performing sites and targeted them for additional support and intensive input so as to alter their trajectory. Terry Holford, the Area Manager for the Midlands division who ran the Hot 100 programme, sent a presentation about it to the relevant sites, including the Station, ahead of a conference call to discuss the plans on 10 May 2018 (page 110).

20. One of the ways in which sales were to be improved at the Station was via the use of an outside bar. Mr Andrews noticed on one of his social visits to the Station that the outside bar was closed. He instructed the claimant to make sure it was open over the weekend of 21/22 April 2018 when good weather was expected. The claimant did not, however, ensure that the outside bar was fully operational that weekend nor did he raise with his management chain that there this would be the case, or why.

21. Mr Andrews raised the issue of the closure of the outside bar with Mr Brown and Ms Strathmore on the Monday morning immediately following i.e. 23 April 2018. He was angry. The site was underperforming and he had given the General Manager a direct instruction of a way in which he, as Managing Director, believed revenue could be increased yet it had, he felt, been ignored.

22. In light of Mr Andrew's complaint, Mr Brown and Ms Strathmore spoke about the claimant's performance and concluded that the time had come to address the claimant's failure to follow instructions through the disciplinary process and to consider placing him on a PIP (performance

improvement plan). Ms Strathmore held an informal investigation meeting with the claimant to explore the incident of the closed outdoor bar. The claimant responded by giving reasons as to why he had not thought that it was the right decision to staff the outdoor bar that weekend and explaining the difficulties he was having in his personal life.

23. On 30 April 2018 the claimant became suddenly unwell with chest pains and shortness of breath (p154). He went to hospital and was advised that he was suffering from stress and anxiety and had had a panic attack. He spoke to Mel Tyson, a colleague in the respondent's Human Resources department and commenced a period of sick leave due to stress and anxiety (p108). The claimant returned to work on or around 22 May 2018. Upon his return, he met with Ms Strathmore who, as well as discussing some day to day operational issues at the Station, agreed a number of adjustments to the claimant's role to ease him back into work and reduce stress. These included his not working after 7pm, having a regular routine of work and restricting the hours he spent behind the bar. He was to extend his sickness absence if needed (p125).

24. During the claimant's absence from work on sick leave, the respondent's concerns about the performance of the Station grew further. The chef was absent without authorisation, the deputy manager was on long-term sick leave which had not been proactively managed by the claimant and the new deputy manager was in need of support.

25. On 14 June 2018 a case meeting was held about the claimant's performance between Matthew Brown and Nick Andrews. The claimant was unaware of this at the time and only became aware of it in December 2018 when he saw an email from Mr Brown summarising the discussions held on that occasion when it was disclosed to him as part of a response to his Data Subject Access Request (p241a). The email was a management communication not intended to be shared with the claimant.

26. The email read as follows (p129a):

On 14 Jun 2018, at 12:54, Matthew Brown <Matthew.Brown@stonegatepubs.com> wrote:

Simon/Nick

We have just had a case meeting with regard to the future management of this individual. As one of my most profitable businesses we need to get it back on track. Currently sales are in decline by over 10% and profit by 15% YTD. Keith's head is not in the business and this has been apparent for the past year. When I arrived I tried to get him back on track and had a meeting with him to discuss why he was not on his game. He admitted that he had domestic issues and that this had impacted on his performance and also that he thought he was getting beyond being a pub manager. I took this on board and suggested that if he wanted to progress from pub in the future that he should consider development and also that potentially going through our development programme might help him get his business back on track, challenge him intellectually and get him back on his A Game. For a month this appeared to have got him in a better place and Andrea was finding him more responsive.

As we know when a business is not performing it is crucial that every other action is being taken to get it back on track e.g taking advantage of the weather opportunity, building a strong team, keeping control of his business. This is where the issues begin. Keith has tremendous staff turnover, he does not lead from the front and often leaves his team in trouble, his controls are poor at best e.g. stocks, labour forecasting, rotas. He does not make best use of the asset. To that end we took the decision to discipline him for failure to carry out a management instruction- to ensure that at peak weather his bars were all open. At this point he went off sick, saying that he needed time off from the business and that he was struggling with his domestic issue. He also refused to speak to Andrea. He then went off sick with stress and anxiety. At this point once he had left the business it became very apparent quite what a mess it was in. The chef was AWOL, the DM was still off sick and hadn't been contacted or managed, the new DM was left to carry the can. We had to borrow cover from branded as the pub was not well staffed , organised or in a good place. A business that makes this much money cannot continue to be run in such a haphazard manner and as he carries the title of GM he has to take some accountability. He returned from sick to then announce he was going on unbooked holiday and once again had no thought or responsibility for the business again leaving us in a difficult situation.

We are disciplining Keith at the end of next week for failure to carry out direct management instruction and our plan is next Tuesday to commence proper formal performance improvement plan highlighting:-

Sales and Profit performance

Labour and TEAM Management including
Business controls.

This is going to take 4-5 months at best to either show improvement or get to a place of dismissal.

We will also be ensuring that he understands the company values and the times that he has clearly paid them know attention

1) One Team - he has no regard for his team or their wellbeing if it impacts on his own personal plans. His leadership is questionable.

2) Raring to go - He can be exceptionally destructive in meeting and very negative

3) Invest wisely - he does not rota correctly to take the most money for the company and he wastes cash at times to cover his absence from the business

4) He is not straightforward - he plays politics, blames everyone else for his woes and does not take accountability

l know he has personal problems, he has developed the business over the years and this is what he continue to throw up however a business now of this size is in a real mess and unless in the performance improvement plan we see substantial positive momentum l think we need to either move him on as it is unlikely that he would want to take a move given his domestics and his ego. The cost to remove would be circa £45k because of his service and his contract.

If you would like any more information please shout

Thanks

Matt

27. The claimant's case to the tribunal was that Mr Brown decided at or around this time that he wanted to dispense with the claimant's services and that this email was evidence of this. This was put to Mr Brown in cross-examination by the claimant. He denied the assertion, explaining that, unless there was evidence of gross misconduct he didn't recall ever having sacked a member of staff. He had never dismissed an individual for poor performance over a 30 year career but was committed to training and retention. He said that good general managers are hard to find and that he saw it as his job to get the claimant "back on track". He said that the respondent's chairman was one of the claimant's biggest fans and that he, Mr Brown, wanted to retain the claimant in the business if at all possible.

28. The tribunal found Mr Brown's evidence to be credible in this respect. It was consistent with the events that unfolded thereafter when efforts were made to find the claimant an alternative site to manage that would provide a stepping stone for him as his personal life settled down, to enable him to move on and progress in his career with the respondent. The email would certainly have been a challenging read for the claimant and it focussed on the commercial needs of the business but the Tribunal noted that this was Mr Brown's job role. This was a frank confidential management appraisal of a problem with a suggested solution. The reference to what might happen if the claimant's performance did not improve was qualified by the rest of the email which evidenced a commitment to genuinely trying to improve the claimant's work performance over a period of 4-5 months and only if that did not work and a transfer was not possible, would a termination of employment be likely.

29. Ms Strathmore held a meeting with the claimant in the week commencing 11 June 2018 to discuss his performance and the "outside bar issue". The claimant cut the meeting short because he needed to leave to collect his son from school at 3pm. The meeting was re-scheduled for 10am on 19 June 2018 but the claimant did not attend advising Ms Strathmore shortly before the meeting that he was not going to be in that day (p132). Ms Strathmore prepared a PIP (p134) and wrote to the claimant inviting him to a disciplinary hearing on 28 June 2018 to consider the issue of failing to follow an instruction from Mr Andrews and herself to open the outside bar (p135). The letter advised the claimant that one outcome of the hearing might be that he would receive a formal warning.

30. The claimant commenced a further period of sickness absence with stress and anxiety. On 26 June 2018 Ben Whitehead of the respondent's HR department sought to arrange a welfare meeting with the claimant with Ms Strathmore to discuss his ongoing absence (p141). The claimant responded indicating that he did not want to meet with Ms Strathmore as he found her approach to him bullying and belittling. Mr Whitehead responded by arranging for the claimant to meet instead with him and Mr Brown on 4 July 2018 (p141). On 27 June 2018 the claimant was signed off work for a further 4 weeks with increasing symptoms of stress and anxiety (p143).

31. A welfare meeting duly took place on 4 July 2018 between the claimant, Mr Brown and Mr Whitehead. The tribunal was provided with minutes of this meeting (p144-146), the contents of which were not challenged by the claimant.

32. The claimant commenced the meeting by explaining how very unwell he was and that his GP was concerned and had referred him to Birmingham Healthy Minds. Mr Brown asked "what can I do to help?" He went on to explain that the company wanted to get the claimant back to work and added "If pressure is the Station, is it that you need to move somewhere else?" The claimant explained the problems that he had been experiencing at the Station and how hard it had been and said that he had been thinking about whether or not he should move somewhere smaller. Mr Brown then stated that he thought that it was necessary for the business to move the Station site on, to take the pressure off the claimant, ensure his well-being and protect the site. He said he wanted to move the claimant out of the Station and to a new site where he could be "out of the limelight" and reinvent himself. The Loxley, a site in Nottingham, was available and the claimant was left to think about this as an option. A formal transfer letter was sent to the claimant, invoking the mobility clause in his contract, on 9 July 2018 (p147).

33. On 16 July 2018 Mr Whitehead rang the claimant to ascertain whether he had given thought to the proposed transfer to the Loxley. The claimant explained that his GP had told him he should not be making significant decisions. During this telephone call the claimant felt unreasonably pressured by Mr Whitehead to make a decision about whether to accept the transfer to the Loxley and ended up terminating the call prematurely.

34. The claimant visited his GP again on 20 July 2018 and was signed off as unfit to work for a further six weeks until 30 August 2018.

35. The claimant submitted a grievance on 20 August 2018 (p153-6), having cancelled a further welfare meeting scheduled for 24 August 2018 (p152). The thrust of the claimant's grievance was that he had been bullied by Ms Strathmore, Mr Brown and Mr Whitehead and he made particular reference to the "unilateral decision by the company to move [him] to a different public house, without having taken into account [his] professional and personal circumstances".

36. The respondent appointed Mr Paul Wright to hear the claimant's grievance. He was at the time Operations Director and had not been directly involved in the issues that were the subject of the claimant's complaints. He held a grievance meeting with the claimant on 9 October 2018 and carried out further investigation of the issues raised thereafter. Mr Wright did not uphold the claimant's grievances and advised him of the outcome by letter of 30 October 2018 (page 200 – 201). In the letter Mr Wright advised the claimant that, whilst the Loxley was now considered the claimant's home site, two other sites nearer to home for the claimant – the Crown in Birmingham and Yates in Stafford, would be held open for

three months as alternatives for him. The claimant was invited to discuss the options further with the human resources team and was referred to occupational health for advice and support.

37. The claimant appealed against the grievance outcome principally on the basis that it left a number of questions he had posed unanswered. A grievance appeal was held on 29 November 2018 by Ben Levick, Operations Director. Mr Levick provided a very detailed outcome letter to the grievance appeal dated 13 December 2018 in which he attempted to answer those questions the claimant said had been overlooked in the original hearing (page 234 – 241).

38. Mr Levick included the following in his letter to the claimant:

> "I understand that you are disappointed to be leaving the Station however I fully support the reasons for invoking mobility as addressed above.
>
> We discussed in the meeting that you were intending to return to work, and that Mel would be your contact as you feel you have a good working relationship with her. I believe you are a good General Manager, who's skills and experience will positively impact on the business and would urge you to liaise with Mel to find the best suitable site for you if you do not believe the Loxley is the correct move for you. I am aware that alternative sites have been proposed but that you have been unable to engage in discussions so far due to your absence.
>
> Once you are fit to return to work, please contact her directly and she will arrange a meeting to discuss your work options."

39. The tribunal concluded that at this time and following the grievance process, the respondent remained committed to the claimant's reintegration into work at a new site to be agreed with him. The claimant told the tribunal in his evidence that he had "no real complaints about the manner in which the grievance was dealt with".

40. By this time the respondent had received an occupational health report following an assessment of the claimant on 5 November 2018 (p207-9). The occupational health advisor expressed the opinion that the claimant would be likely to be fit to return to work once the management issues that were troubling him had been resolved.

41. In December 2018 the claimant received copies of material of which he was the subject, including the email of 14 June 2018 from Mr Brown to Mr Andrews. He was very upset by the tone of the email and in particular the reference to him having an ego and what he perceived as being an indication that Mr Brown wanted him to leave the respondent. He discussed the matter with Sofia Hafizova, Human Resources Business Partner, at a meeting on 15 January 2019 indicating that, whilst he was fit to return to work, he did not see how he could in light of what he had read in the email (p242). The claimant said in this meeting that he had been in

touch with his solicitors who would contact the company, although no such contact was forthcoming (page 244).

42. The claimant's salary was reinstated from 28 January 2019 when he was deemed fit for work. A return to work meeting took place on 12 February 2019. By this time the company had contacted Mr Curtis Buck, Area Manager for the Midlands, requesting that he consider placing the claimant as General Manager at the Crown, one of the sites he oversaw in Birmingham. It was suggested that this site was potentially suitable for the claimant because it was a low-volume site with only six or seven employees and was close to the claimant's home with a commute of between 25 and 30 minutes. Despite the fact that Mr Burke had planned to move the Holding Manager of the Crown into that post permanently, he agreed to discuss the opportunity with the claimant. He and Denise Burke, ER and Policy Manager, attended the return to work meeting with the claimant.

43. Although the claimant continued to raise his unhappiness at the way he had been treated by Andrea Strathmore and Mr Brown (in particular the contents of the email), the meeting was largely a positive one and Mr Buck gained the claimant's agreement to take up the position as General Manager at the Crown. The claimant expressed positive feelings towards commencing his duties there and Mr Buck assured him of his support.

44. The claimant told the tribunal that he had "absolutely no problems" with Mr Buck, saying that he was "very helpful" and "very understanding" whilst he worked for him. Nothing Mr Buck did caused the Claimant to later resign. Mr Buck spoke to the claimant in advance of his start date at the Crown to update him on his team and found him genuinely keen to get started.

45. The claimant started work on Monday 18 February 2019 as General Manager at the Crown. Mr Buck visited him on site and supported him to settle in. Everything seemed to go well. The Crown became the Claimant's home site. His salary remained the same (p252).

46. However, on Thursday 21 February 2019 the claimant telephoned Mr Buck to say he would not be able to work that day. He described feeling suicidal and having difficulty breathing. He had pulled his car over outside a pub called the Sack of Potatoes, less than a mile away from the Crown. He told Mr Buck that he "just couldn't do it" and "couldn't do it to himself" and he referenced the way he had been feeling the previous year (p254-5).

47. Mr Buck found the claimant calm and assessed that he was not in immediate danger, so he advised him to stay where he was and await Mr Buck's return telephone call. Mr Buck then set about arranging to cover the claimant's shift at the Crown, as the claimant had rung in sick less than 10 minutes before he was due to start.

48. When Mr Buck rang the claimant back he was driving. He said he had left the keys to the Crown with the duty manager at the Sack of Potatoes, also

a pub under the respondent's management. This was a significant breach of security and would have been dealt with under the disciplinary procedure under other circumstances. The claimant did not return to work but commenced a further period of sick leave.

49. The following week, the respondent arranged for a mediation meeting to take place between the claimant and Mr Brown on 25 February 2019. This followed feedback from Mr Buck to Mr Brown about the claimant's concerns raised in his return to work meeting on 12 February 2019. The claimant was quite emotional at this mediation meeting. His main concerns were the meeting of 4 July 2018, his personal circumstances at the time the decision was taken to move him from the Station and the email of 14 June 2018. Mr Brown apologised to the claimant for the tone and content of the email, reassured him that he wanted him back and was looking forward to working with him at the Crown. Mr Brown told the claimant that he would have his full support to develop the Crown in whatever direction he saw fit. The meeting ended amicably. The claimant and Mr Brown shook hands and Mr Brown left the meeting feeling confident that the parties had turned the corner.

50. On 27 February 2019 the respondent sent an email to the claimant from Victoria Kitchen the Human Resources Business Partner who had acted as mediator (p2258-9). She included the following:

> "I am aware that you are currently absent due to illness at the moment and will be revisiting your GP on Friday for further advice. You agreed to undertake further counselling and committed to reflecting on the meeting and Matts comments to establish how and if we can move forwards together. You confirmed that you would review whether a phased return to work, shadowing another GM or working on any on-going projects would assist your return. If there is any further support or assistance you felt we could provide you would let me know. You have been provided with the helpline number, however feel that the private counselling would be more beneficial."

51. On 1 March 2019 the claimant wrote to Denise Burke asking for a "protected workplace discussion" the following week. Ms Burke replied on the same day to suggest that telephone call would be more practicable due to diary commitments but the claimant appeared not to see her response (p260). The tribunal found that this reference indicated that the claimant, having taken legal advice, was interested to find out whether there would be an opportunity to leave the respondent under the terms of settlement agreement.

52. On 11 March 2019 the claimant sent the following email to Denise Burke:

From: Keith Ward
Sent: 11 March 2019 15:51
To: Denise Burke
Subject: Termination of employment

I am writing to confirm that I consider my contract of employment to be

terminated due to fundamental breaches of my contract by the company . I consider that I have been constructively dismissed , I also consider that the company has acted in breach of the equality act despite being aware of my disability .

I consider that the company is in total breach of the duty of care and is also in breach of the terms of trust in confidence that should exist between employer and employee . I have no alternative other than to leave the company forthwith. I am prepared to discuss the contents of this letter with you.

53. The respondent made efforts to establish that the claimant was indeed intending to resign in sending this email. It became clear that he did so intend and he was therefore processed as a leaver with an effective date of termination of 11 March 2019.

The Law

54. The law relating to unfair dismissal is found in the Employment Rights Act 1996 ("ERA"). In order to claim unfair dismissal a claimant must first prove to the tribunal that he or she has been dismissed. In a case such as this one of constructive dismissal, section 95 ERA defines dismissal as follows:

95 Circumstances in which an employee is dismissed.

(1)For the purposes of this Part an employee is dismissed by his employer if …..

(c)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.

55. The leading case which expands this statutory description of constructive dismissal is *Western Excavating (ECC) Ltd v Sharp* **[1978]** ICR 221 which confirmed that the test is a contractual one. In other words, did the employer breach the claimant's contract of employment in a serious and fundamental way? This is sometimes said to be a breach which tends to suggest on the part of the employer that it no longer considers itself bound by the contract of employment of the employee. It might consist of a series of breaches which, taken together, produce the same effect. This is often said to be a case of the "last straw" doctrine.

56. If there has been such a breach of contract by the employer, the employee must then show that he or she resigned in response to that breach and not for some other unconnected reason.

57. Thirdly, the resignation must take place within a reasonable time so

that it cannot be said that the claimant "waived" the respondent's breach of contract in the sense that the employee had "let the issue go" or agreed/decided not to do anything about it at the time.

58. It is common in a constructive dismissal case for this issue – i.e. dismissal, to be the sole or main issue in the case. In other words, if the claimant proves he or she was dismissed, the respondent will not succeed because it has not put forward a potentially fair reason for the dismissal in the alternative. To do so would, in may cases, be inconsistent.

59. This is such a case. The respondent did not argue that the dismissal, if such it was, was fair.

60. The tribunal must still consider in such a case whether the respondent acted reasonably or unreasonably in all the circumstances of the case in treating the reason as sufficient reason to dismiss having regard to equity and the substantial merits of the case in accordance with section 98(4) ERA.

61. In order to apply the legal tests set out above, the Tribunal asked itself the following questions in coming to its conclusions:

- Did the respondent breach the implied term of trust and confidence in the claimant's contract of employment?

  In looking at this, the Tribunal considered whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.

- Was the breach a fundamental one?

  The Tribunal considered here whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

- Did the claimant resign in response to the breach?

  The Tribunal looked at whether the breach of contract was a reason for the claimant's resignation.

- Did the claimant affirm the contract before resigning?

  Here the Tribunal considered whether the claimant's words or actions showed that he chose to keep the contract alive even

after the breach by the respondent.

Conclusions

62. The claimant argued that, in seeking to transfer him from the Station pub when he had just returned from sick leave, and to write about him in the terms of the email of 14 June 2018 was a breach of the implied term of trust and confidence in his contract of employment.

63. Having heard all the evidence, the tribunal concluded that the respondent had not breached the claimant's contract of employment, seriously or at all, by these actions.

64. The claimant's contract of employment entitled the respondent to transfer him between sites (clause 25) and it was custom and practice for this to be done with managers across the business. It was common ground that there were performance issues at the Station and it was not unreasonable for the respondent to wish to address these, and to do so as a matter of priority. The claimant was suffering from poor health and described a number of stresses associated with the role at the Station, as well as experiencing a difficult period in his personal life that was also impacting on his mental health. The Tribunal concluded that there were genuine reasons against this backdrop for the respondent to decide that it would be in the interests of both the clamant and the business for him to be transferred to work as a General Manager at a different, less demanding site. The decision was not motivated consciously or unconsciously by an intention to cause a detriment to the claimant. On the contrary, the tribunal found that the respondent hoped by doing so to retain the claimant in the business and help him to return to better health and improved work performance.

65. The respondent proposed the transfer to the claimant on 4 July 2019 but did not implement it then, leaving him time to consider and respond. He was not chased for a response for almost 2 weeks. When he raised his concerns about the distance from home and the nature of the Loxley site, the respondent made 2 alternative options available to him. The claimant accepted the Crown as a suitable site for him. In this way the respondent complied with the terms and spirit of the contract of employment by using all reasonable endeavours so as to achieve the identification of a transfer site by mutual agreement with the claimant. That it was in the context of the grievance procedure that this solution emerged was also evidence of the claimant's contract of employment being adhered to, not broken. The grievance procedure was implemented correctly and did its job, leading to a resolution.

66. The Tribunal further found that the respondent did not breach the claimant's contract by Mr Brown writing the email dated 14 June 2018. This was an email between managers not intended for the claimant's readership. Its assessment of the claimant's abilities and limitations was provided not to be discourteous or pejorative about the claimant but was a

frank assessment that, in context, provided background to the analysis of what solution should be proposed to the problem of his performance. The analysis was not without basis in fact and management experience. The thrust of the email was about how to solve the problem whilst not losing the claimant from employment, not the contrary.

67. When the claimant read the email and was upset, the respondent took prompt steps to arrange for Mr Brown to meet with him for mediation at which Mr Brown apologised for any offence caused and the Human Resources Business Partner who led the mediation followed up with proposals to support the claimant to put the issue behind him.

68. The disclosure of the email to the claimant was not a breach of contract either but was rather a response to the claimant's lawful request under the Data Protection Act 1998 to see it.

69. The Tribunal concluded on the basis of the evidence taken in totality that the respondent wanted to retain the clamant in employment and that the steps it took were aimed at achieving this, rather then achieving his departure, as he alleged.

70. Accordingly, as the Tribunal did not conclude that the respondent had breached the claimant's contract of employment, it followed that, applying the legal test set out above, he was not dismissed but resigned and his claim to unfair dismissal could not therefore succeed.

71. It was not necessary for the tribunal to go on and determine whether the claimant resigned in response to a fundamental breach of his contract and/or did so in a reasonable time. If it had been necessary to do so, the tribunal would have concluded that the reason for the claimant's resignation was principally the decision to transfer him from the once very successful "flagship" site of the Station to another site which he felt was beneath his experience and ability. Having accepted the role at the Crown unequivocally at the meeting with Mr Buck on 12 February 2019, the Tribunal would have concluded that, insofar as there had been a breach of contract in this respect, it had been waived by the time the claimant resigned on 11 March 2019.

Employment Judge J Jones
22 October 2021