



EMPLOYMENT TRIBUNALS

Claimant: Ms Jacqueline O'Donnell

Respondent: Pareto Retail Ltd t/a Bargain Booze

Heard at: Liverpool **On:** 6 & 7 September 2021

Before: Employment Judge Ord

Representation:

Claimant: Fran Trousdale (HR Consultant)

Respondent: Adrian Costain (Managing Director of Respondent)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded.
2. The claimant's claim that she had a right to be accompanied under section 10 of the Employment Relations Act 1999 is not well-founded.
3. The claimant's claim under section 38 of the Employment Act 2002 for non-provision of a statement of employment particulars is not well-founded.

The Complaint and Issues

4. The Claim Form indicates unfair dismissal but it was unclear whether the claimant claimed constructive dismissal or dismissal by the respondent. It was equally unclear at the hearing what the claimant was trying to claim and she attempted to run both arguments.
5. It is recorded in the Case Management Summaries of 18 May 2020 (the claimant was represented by a solicitor) and 10 December 2020 that the claimant resigned and was claiming constructive dismissal.
6. Her case is put differently however in her witness statement of 4 July 2020 where she claims she did not resign. Her representative's document entitled "Claimant's Heads of Claims/List of Issues as at 20/8/2021" suggests that there is an issue as to whether the claimant resigned or was dismissed. In it she claims either constructive dismissal under section 95(1)(c)

Employment Rights Act 1996 (ERA) or unfair dismissal by the respondent terminating the employment under s 95(1)(a) of the ERA.

7. In the Response Form it says that the claimant resigned.
8. The respondent put forward a completely different set of issues in the document "Respondents Final Updated List of Issues/Head of Counter-Claim" as contained in the electronic bundle (pages 3 to 5) and purported to make a counterclaim. However, as the claimant is not making a breach of contract claim as provided for by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the Tribunal has no jurisdiction to hear a counterclaim.
9. From considering the evidence and all the documentation before the Tribunal, the issues to decide are:
 - 1) Whether the claimant was dismissed or whether she resigned;
 - 2) If she was dismissed, whether this was fair;
 - 3) If she resigned, whether this was in response to conduct by the respondent, which amounted to a fundamental breach of the employment contract.
10. There are also the following issues to decide:
 - 1) Whether the claimant is entitled to an award under section 38 of the Employment Act 2002 for non-provision of a statement of employment particulars.
 - 2) Whether the claimant had a right under section 10 of the Employment Relations Act 1999 to be accompanied at the meeting of 26 October 2019.

Evidence

11. The Tribunal had before it the following:
 - 1) A Case Management Summary dated 21 May 2020
 - 2) A Case Management Summary dated 10 December 2020
 - 3) A letter from the claimant's representative dated August 2021 including the document "Claimant's Heads of Claims/List of Issues as at 20/8/2021".
 - 4) A 6 paged bundle from the respondent's representative, which includes the document "Respondents Final Updated List of Issues/Head of Counter-Claim".
 - 5) A 128 paged bundle of documents
 - 6) Email from Wirral Borough Council regarding the Designated Premises Supervisor, dated 29 October 2019

Findings of Fact

Background

12. At all material times the claimant was a manager at the respondent's Bargain Booze off-licence store in Borough Road, Prenton. Adrian Costain was the respondent's managing director. The respondent had a few stores

located on the Wirral and Liverpool. Due to difficult economic circumstances, the respondent went through some restructuring, and sold its store at Grange Road West, Birkenhead in December 2018.

13. The respondent also planned to sell the Prenton store and it was offered to the claimant. However, although the claimant showed an interest, terms were not agreed. The buyer of the Grange Road West store, Mr Ali, declared an interest in buying the Prenton store. The claimant and other staff were informed of this. Whilst there was some talk of potential redundancy in the summer of 2019, and staff were advised to contact ACAS, the claimant was never made redundant.
14. The claimant then rented premises at 730 Borough Road, which was very close to the respondent's Prenton store at 756 Borough Road. She also made a licensing application to Wirral Borough Council with a view to setting up her own off-licence/convenience store at this location. The claimant successfully obtained this licence.
15. The claimant in evidence said that she opened her own store on 4 November 2019, although she had not planned to open so early.
16. Adrian Costain requested that the claimant move to another of its stores, either Morton or Upton, which would not be competing with the claimant's new store. Both of these stores were only a few miles away from Prenton. He did not want the claimant to be working at the respondent's Prenton store a few doors away from her own store and in a position of being able to poach the respondent's customers.
17. In evidence, Adrian Costain referred to the standard Bargain Booze franchise Contract of Employment, which he said all staff were bound by and quoted the provision which said that employees "*...may be required to work at any company branch according to the needs of the business*".
18. The claimant in cross examination confirmed that she had previously worked at other stores to get her hours in.
19. The claimant was not prepared to move store on this occasion. Subsequently, her employment terminated. On 29 October 2019 Wirral Borough Council informed Adrian Costain by email that the claimant had given them notice of her request to be removed as Designated Premises Supervisor for the respondent's Prenton store.
20. The claimant's P45 was processed on 1 November 2019 backdated to 28 October 2019. The claimant received it on 3 November 2019.
21. The claimant took advice from ACAS and thereafter on 2 November 2019 sent a text to Adrian Costain saying that she had taken legal advice and he had two options, either he make her redundant or she would bring a claim in the Employment Tribunal for constructive dismissal.
22. The respondent replied on 2 November 2019 stating he disagreed with her version of events and said she had withdrawn her services. He asked her whether she was still going to open her premises 100 metres away from the Prenton store and whether she was prepared to move to the Upton store.

23. The Prenton store closed on 31 December 2019. Another employee "Dean" was offered redundancy if he did not want to transfer to another store. The claimant suggests that the fact he was offered redundancy is evidence that it was not reasonable to expect an employee to relocate.

Meeting 26 October 2019

24. On 26 October 2019 Adrian Costain and his son, Finloe Costain (who was a manager with the respondent company), went to the Prenton store to meet with the claimant and confront her about her new store. The claimant did not hide her intentions and was open about her proposed new venture, which she said she planned to open within weeks.

25. Adrian Costain told the claimant that he believed her new store would be in direct competition with the respondent's Prenton store, which she managed, and therefore he wanted her to move to another store. Morton or Upton were suggested. The claimant refused to transfer.

26. There is some conflict of evidence as to exactly what was said.

27. The claimant denies resigning. Her evidence is that Adrian Costain told her that the meeting was not a disciplinary hearing but she must give him the Prenton keys as she could not continue working there. This was because he had found out that she had rented a shop on Borough Road in direct competition with him. She asked Adrian Costain if she could stay at the Prenton store, even if this meant reducing her hours, but he said no.

28. The claimant said that he gave her an ultimatum to the effect that "*You either work at another shop or you go.*" She replied that she did not see staying in Prenton as a problem, as her shop was not ready yet. She said she could not work at Moreton because of the cost and inconvenience of public transport as they were about 5 miles away, and the fact she would not feel safe getting public transport home after 10pm. She asked "*So, what you are saying is if I am not prepared to work in another shop then I am off the books today?*" He said yes.

29. The claimant said her keys were taken off her and she undertook a cursory handover. Adrian Costain asked her when she would be leaving and she replied that she would go now. He then called a manager at another store and told her that the claimant had resigned.

30. Adrian Costain's evidence was that he did not dismiss the claimant. He simply told her that she would need to work in another store, Moreton or Upton, because of the proximity of her competing business to the Prenton store. She had worked at other stores before. He was concerned that, if she stayed in Prenton, she could encourage his local customers to shop at her store, hence losing him business. That would not happen if she worked at another branch further away from her own store. He also believed it was unsustainable for her to be working two shops long term. The claimant's response was to resign from being the Prenton manager and to ask him if she could reduce her hours to 20 hours per week. He refused and she said she would be leaving soon anyway and so she may as well go now.

31. Finloe Costain's evidence is that the claimant said she was not going to move to another store. She was planning on opening her own store within a couple of weeks and so she would just move across to her own business early. The keys were handed over and she left.

Terms and Conditions

32. The claimant says that she never received a written statement of terms and conditions.

33. Adrian Costain said that the standard Bargain Booze franchise Contract of Employment was contained within the Bargain Booze franchise HR manual, a copy of which was kept in each of the respondent's Bargain Booze stores. As the claimant was the manager of Prenton, she was responsible for ensuring its availability to staff. All staff were told that the terms and conditions were within the manual at the stores.

34. He said that, after the claimant left the respondent's employ, manuals were found on site. The claimant said she never had access to the manual.

35. He also said in evidence that there were regular Bargain Booze meetings and training sessions at Crewe, which included matters relating to terms and conditions, although he did not think the claimant always attended. The claimant said she often attended the Crewe meetings and her husband drove her there.

36. The respondent has been consistent in his evidence and I accept what he says.

37. The claimant's evidence in relation to her dismissal claim was that she believed that, in the absence of any non-compete clause in her contract, she should have been allowed to continue to work at Prenton.

The Law

38. Section 95 of the Employment Rights Act 1996 states, as far as is relevant:

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

(a) The contract under which he is employed is terminated by the employer (whether with or without notice);

39. The burden of proof falls on the employee to show that a dismissal took place and the standard of proof is on a balance of probabilities. Therefore, the question for the tribunal is "Was it more likely than not that the contract was terminated by dismissal rather than by resignation?"

Dismissal by employer

40. Section 98 of ERA provides, so far as is relevant:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
- (a) the reason (or, if more than one, the principal reason) for the dismissal and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Constructive dismissal

41. As per s95(1)(c) ERA, an employee is dismissed if:

“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.

42. In ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***, the Court of Appeal ruled that an employer’s conduct must amount to a repudiatory breach of contract to give rise to a constructive dismissal. Lord Denning put it as follows:

43. *“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 the employer’s conduct. He is constructively dismissed.”*

44. A resignation in response to conduct by the employer which falls short of being a breach of a fundamental term, is simply a resignation. The Court of Appeal expressly rejected the argument that s95(1)(c) ERA introduces a concept of an employer’s reasonable behaviour into contracts of employment. Consequently, a constructive dismissal claim based simply on an employer’s behaviour without a fundamental breach, will not amount to constructive dismissal.

45. In ***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT*** Mr Justice Browne-Wilkinson put it this way:

“To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put with it.”

46. Whilst this case went on to the Court of Appeal, this point was not on appeal.

47. In ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL***, Lord Steyn formulated the implied term of trust and confidence as being an obligation 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.

48. In *Frenkel Topping Ltd v King* UKEAT/0106/15/LA the EAT warned about the dangers of setting the bar too low. That decision makes it clear that acting in an unreasonable manner is not sufficient.

Statement of Employment Particulars

49. Section 1 of the ERA requires an employer to give a worker a written statement of particulars of employment.
50. Section 38 of the Employment Act 2002 makes provision for an award of two or four weeks' pay against an employer for not providing a statement of employment particulars, where an Employment Tribunal has found in favour of a claimant (in certain jurisdictions).

Right to be accompanied

51. Section 10 of the Employment Relations Act 1999 gives a worker the right to be accompanied at a disciplinary or grievance hearing.

Conclusion

52. At the meeting on 26 October 2019 the Adrian Costain told the claimant that she could no longer work at the Prenton store because of the risk of her directing his local customers towards her own competing store. However, he offered her work at Moreton or Upton instead. The claimant refused and resigned.
53. I accept Adrian Costain's evidence that the claimant said she was leaving immediately as she was planning on opening her own store within a couple of weeks anyway. This is corroborated by Finloe Costain's evidence. It is also supported by the fact she removed herself as Designated Premises Supervisor for the respondent's Prenton store.
54. The meeting was not a disciplinary meeting. It was a meeting to discuss future working arrangements. Therefore, the claimant had no right to be accompanied.
55. The claimant's text of 2 November 2019 indicates that she would take a constructive dismissal claim if she was not paid redundancy. Also, at a previous case management hearing, where she was represented by a solicitor, the case management summary states that she was claiming unfair constructive dismissal. Consequently, the question for the Tribunal is whether the respondent's conduct amounted to a repudiatory breach of contract.
56. The respondent was faced with a situation whereby his Prenton store business was at risk of losing customers to the claimant's competing store a few doors away. If she continued working at Prenton, it would give her the opportunity of encouraging the respondent's customers to shop at her own store.

57. The standard Bargain Booze contract of employment provided for mobility between stores and the claimant had worked flexibly at other stores before. Both Moreton and Upton were only a few miles away from Prenton and not much further to travel to. The fact that another employee was offered redundancy rather than re-locate is not an indication that re-location was a breach of the employment contract.
58. It was not a breach to request the claimant to move stores under the circumstances. The respondent did not fundamentally breach the employment contract by taking this step. Therefore, there was no constructive dismissal.
59. As the constructive dismissal claim fails, there is no claim under section 38 of the Employment Act 2002 for not providing a statement of employment particulars. In any event, the Tribunal finds it unlikely that the claimant did not have access to the Bargain Booze employment contract, given her managerial position and her responsibility for keeping the HR manual at the store, which contained the employment particulars. Also, she knew there was no non-compete clause in the contract, which suggests that she had access to it and had read it prior to setting up her own competing business. Therefore, the Tribunal finds that the claimant had access to her terms and conditions

Employment Judge Liz Ord

Date 28 November 2021

JUDGMENT SENT TO THE PARTIES ON

2 December 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.