EMPLOYMENT TRIBUNALS

Claimant: **Mr S Dunnett**

Respondent: **A Plus Care Ltd**

Heard at: **London South Employment Tribunal (by CVP)**

On: **27.01.2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Ms Younis, Litigation Consultant

RESERVED JUDGMENT

1. The Claimant was constructively dismissed and the dismissal was unfair within the meaning of s.98 Employment Rights Act 1996.

REASONS

Introduction

1. The Claimant complains of constructive unfair dismissal.

The issues

2. In the circumstances explained below the issues were agreed at the outset of the hearing as follows.[1]

3. Was the Claimant dismissed?

[1] I have re-ordered some of the allegations so as to put them in chronological order.

3.1. Was the Respondent in breach of the implied term of trust and confidence? The Claimant says it was by the following matters (individual or cumulatively):

3.1.1. On 3 February 2019, the Claimant was summoned to a meeting by Mr Roman at 7.30pm without notice;
3.1.2. In February 2019 [the date of 2018 was originally given but this was corrected in evidence], Mr Roman took a holiday in Romania without telling the Claimant whilst the business was under investigation by the police following fraud by a former member of staff;
3.1.3. On 8 May 2019 the Claimant told an underperforming carer that he would not be offered any further work. Mr Roman undermined him by offering the carer further work. The carer then failed to attend some shifts and forged time sheets. The Claimant told Mr Roman this but he kept the carer on;
3.1.4. In around 7 July 2019 the Claimant and Mr Roman agreed between themselves that the domiciliary side of the business should close as it was not profitable. They met with the Registered Manager to convey the news. Mr Roman asked the Claimant to lead the meeting. After the Claimant explained the decision Mr Roman reversed it. This made the Claimant look incompetent and damaged his relations with the Registered Manager;
3.1.5. Booking records for carers were held off site which made it difficult for the Claimant to answer queries. He asked repeatedly for the system to be computerised but this never happened.
3.1.6. On 3 July 2019, the Claimant returned from holiday and was summoned to a meeting at 6pm;
3.1.7. The Claimant's laptop broke on 11 August 2019. It was never fixed.
3.1.8. Mr Roman failed to attend a meeting in 2020 to discuss concerns Richmond care homes had with carers that the Respondent had supplied.
3.1.9. At some point in 2020 a meeting was set up with Richmond care homes. The Claimant attended but Mr Roman did not.
3.1.10. In February 2020 the Claimant secured a business opportunity to provide carers to a home that specialised in mental health patients. Mr Roman arranged training for carers. The trainer he arranged left shortly after the training began saying "it was the wrong training" and would be insufficient. The contract was lost because Mr Roman had scrimped on the training;
3.1.11. In May 2020, Mr Roman left the business without warning for 9 weeks without telling the Claimant;
3.1.12. In May 2020, Mr Roman sent a carer to work a 12 hour shift after she had just finished a 12 hour shift at a sister care home. The client was furious and the Claimant had to deal with the matter.
3.1.13. On 29 July 2020, Mr Roman went to Romania again. The Claimant saw him on 2 August 2020 driving through the village. The Claimant messaged him and he told the Claimant there had been a change of plan. Mr Roman went to Romania yet again on 16 August 2020 and promised the Claimant support with the business whilst the administrator was on annual leave between 31 August and 8

September 2020. None was provided. The Claimant was unable to take leave;

3.1.14. On 20 July 2020, the Claimant received a call from an angry home manager. Mr Roman had tried to send a carer who had returned from Romania the previous day. At the time it was compulsory to self-isolate upon arrival from Romania. Mr Roman attempted to avoid this by giving a false name for the carer and placing her in a home next door to the one she usually worked in;

3.1.15. On 27 August 2020, a debt collector attended the office demanding money and threatening to take property if £1,175 was not paid. The Claimant telephoned Mr Roman who did not answer. However, he immediately answered when the administrator called him, leaving the Claimant feeling humiliated.

3.2. If so did the Claimant resign in response to the breach?

3.3. Did she do so without delay, affirmation or waiver?

3.4. What was the final straw?

4. If the Claimant was dismissed:

4.1. What was the reason for the dismissal?
4.2. Was it fair in all the circumstances according s.98(4) Employment Rights Act 1996?

5. If the Claimant was unfairly dismissed, to what remedy is he entitled?

5.1. What remedy does the Claimant seek?
5.2. Should any reduction be made to any basic and/or compensatory award be made on account of the Claimant's conduct?
5.3. Should a *Polkey* reduction be made?

The hearing

6. The parties had not agreed a list of issues in advance of the hearing. It was essential in my view for the issues to be identified, particularly the allegations of breach. I therefore produced a draft list that was circulated to the parties at around 9.30am on the morning of the hearing. At 9.45am I was forwarded an email from the Respondent that had been sent to the tribunal at 8.45am attaching the Respondent's list of issues and the Respondent's written submissions.

7. At the outset of the hearing we had a good discussion of the issues.

8. I explained, and it was agreed, that the Respondent's list of issues was generic in form. It was not a document I could adopt since it did not identify either the term of the contract the Respondent was said to be in repudiatory breach of nor the particulars of breach. On the other hand, both parties agreed that I had correctly captured the issues in my draft list. The Claimant provided four pieces of further

information that I had left blank for him to provide. With those additions the list was finalised and agreed all around.

9. Having dealt with all other preliminary matters we adjourned from 10.30 am to 11 am so I could finish reading the bundle. When we resumed at 11am Ms Younis said that the Respondent wanted to add a further issue, namely to argue that the Claimant did not have two years continuous employment. It wished to aver that the Claimant had been self-employed between June 2018 and February 2019 and only commenced employment then. I considered the application but rejected it because:

    9.1. Form ET3 asks for the Claimant's dates of "employment" at box 4. The dates 11 June 2018 – 30 September 2020 are given and are given without qualification.
    9.2. The Grounds of Resistance themselves refer to the Claimant's "employment" commencing with the Respondent on 11 June 2018 in the position of sales/training and to him being promoted to the role of business manager on 1 February 2019. The narrative of the Grounds of Resistance refers repeatedly to the Claimant's contract of employment. In my view, the Respondent's pleaded case is unambiguously that the Claimant was an employee from 11 June 2018.
    9.3. At the outset of the hearing we agreed the issues in the case. This agreed list did not include any issue as to employment status.
    9.4. In her written submissions, served on the morning of the hearing, Ms Younis's took no point on, and said nothing about, employment status/continuity of employment.
    9.5. Plainly, the Respondent raised this matter at an extremely late stage. It did so on zero notice to the Claimant, a litigant in person.
    9.6. I asked Ms Younis how she proposed to deal with employment status given that the issues had not previously been raised, that this was a one day hearing, that the Claimant was a litigant in person, that employment status is complex legally and is highly fact sensitive and that neither side had prepared for the matter. She initially said that she planned to deal with it "in cross-examination". I asked whether this would really be fair since it would not give the Claimant any chance to prepare or even lead evidence of his own. Ms Younis then suggested that we deal with employment status today and the substance of the case another day. That did not meet the concern about fairness to the Claimant.
    9.7. I asked Ms Younis to explain (1) why the point was taken so late in the day and (2) what in substance was behind it. The answer was (1) simply that a previous file handler had not spotted the point. And (2) that the claimant had been paid by invoice rather than PAYE until February 2019.
    9.8. In my view the Respondent makes a clear concession that the Claimant was employed and had qualifying service claim to claim ordinary unfair dismissal in its pleaded response to the claim. It would not be in accordance with the overriding objective or the interests of justice to exercise my discretion to allow the Respondent to amend its response and withdraw that concession.
        9.8.1. There is no good reason why the point has not been taken until now.

9.8.2. The only fair way of dealing with employment status would be to adjourn and give the Claimant time to properly prepare for the matter and that would cause inevitable delay which is prejudicial to him. It is also prejudicial to the tribunal system and other litigants who use it. It would involve wasting today and then taking further time out the list for a further hearing or hearings in this case of increased length.

9.9. Those were sufficient reasons for me to refuse the implied application to amend the response and the application to add employment status to the list of issues. I would add, though this is incidental, that on the face of it, the basis upon which the Respondent seeks to aver that the Claimant was self-employed is very weak. Of course invoicing for pay rather than being paid by PAYE is a relevant factor; but on its own it is nothing like decisive. Having (at the stage of hearing the application) already read the bundle and statements my strong impression was that all or almost all other factors pointed towards employment including, but not limited to, the fact the Claimant had a written statement of terms of *employment* dating from 11 June 2018.

10. *Documents before the tribunal*:

10.1. *Agreed bundle running to 101 pages*;
10.2. An email from a client of the Respondent's dated 22 July 2020 complaining that the Respondent had acted in a deceitful way. This email was disclosed by the Respondent in the course of the hearing.

11. *Witnesses the tribunal heard from*:

11.1. The Claimant;
11.2. Razvan Roman, Director of the Respondent;
11.3. Amanda Cutting, Administrative Assistant;
11.4. Luiza Howes, On-Call Coordinator (joined the CVP hearing by telephone because of technical problems joining by video).

12. *Submissions*:

12.1. The Claimant made a short closing statement. The Respondent relied upon written submissions as well as a short closing statement. I considered what was said, in both cases, carefully.

Findings of fact

13. The evidence in this case was short and thin on both sides. For that reason the findings of fact are not enriched with a great deal of detail.

14. The Respondent is in the business of providing carers and nurses to care homes and nursing homes. It is a very small business. Mr Razvan Roman is director of the Respondent. He is the most senior person in the business and is its leader.

15. The Claimant's employment with the Respondent commenced on 11 June 2018. His job title was '*Office Sales Person'*. This was reflected in a Statement of Main Terms of Employment. He was promoted to Business Manager on 1 February 2019.

16. Mr Roman's partner, Ms Howes, also works for the business. Her role is 'On-Call Coordinator'. There was also an administrative assistant and at one time a manager for domiciliary care. The Claimant's wife provided the business with bookkeeping services.

17. The Claimant's wife drafted the Claimant's Statement of Main Terms of Employment in the course of her duties for the Respondent. There is nothing in the evidence to suggest that she did this surreptitiously and I find that the written terms were agreed between the Claimant and the Respondent freely and of their own volitions.

18. The Claimant resigned in February 2019 in part because he had an interest in pursuing his side venture as a singer. However, his resignation was withdrawn and as noted above he was promoted to Business Manager.

19. On 3 February 2019, the Claimant was asked to attend a meeting by Mr Roman at 7.30pm without prior notice. The meeting itself was a pleasant one and was over a nice meal.

20. Later in February 2019, Mr Roman took a holiday in Romania without telling the Claimant. I do not accept that the business was under investigation by the police at this time. A former member of staff was under investigation having been reported to the police by the Respondent for some sort of fraud.

21. When Mr Roman went to Romania, he always took his work phone with him. This mitigated his absence to some degree, but I accept that it made him more difficult for the Claimant to get hold of in real time. In cross-examination it was repeatedly put to the Clamant that if he took a call that required Mr Roman's input, but Mr Roman was unavailable, this had no impact on the Claimant because his job in that instance was simply to pass on a message to Mr Roman. I do not accept that reflects the reality of the situation at all. This was a small business and the reality was that the Claimant, as a senior employee taking a calls from clients that wanted urgent answers to urgent complaint/queries, had to do his best to assist the clients. It would have been rude, poor customer service and bad for the business if the Claimant had simply taken a message in every instance and done nothing himself to try to help the client.

22. A lot of the telephone calls related to urgent questions from care homes asking what was going on if a carer who had been booked did not turn up. In order to resolve those queries it would be necessary to look at the booking rotas. Unfortunately, on the non-domiciliary side of the business, this information was in hard copy only. It was in a book that was kept off site. (The rotas were eventually written up electronically in order to execute payments but this did not help with real-time queries). The Claimant did not always have access to the book and thus often needed to speak to either Mr Roman or Ms Hawes to answer customer

queries. The net result was that if Mr Roman and/or Ms Hawes were not available the Claimant found himself embarrassed by being unable to assist clients and/or spent a lot of time trying to get hold of information.

23. I prefer the Claimant's evidence that he asked for the booking system to be computerised to the Respondent's evidence that he did not. The Claimant's evidence on this was logical and cogent.

24. On 8 May 2019 the Claimant told Carer A that he would not be offered any further work. This was because there had been significant underperformance by Carer A and numerous complaints about him. The Claimant had agreed this approach with Mr Roman. In around August 2020, Mr Roman booked Carer A for further work. The Claimant found this undermining. It did not work out well, as Carer A continued to underperform.

25. On 3 July 2019, the Claimant returned from holiday and Mr Roman asked him to attend a meeting at 6pm on no notice. The meeting itself was a pleasant one and was over a nice meal.

26. On around 7 July 2019 the Claimant and Mr Roman agreed between themselves that the domiciliary side of the business should close as it was not profitable. They met with the Registered Manager, Katie, who was responsible for this side of the business to convey the news to her. Mr Roman asked the Claimant to lead the meeting.

27. In the course of the meeting, Katie was extremely upset and was in tears. She pleaded for more time to make a success of that part of the business. Mr Roman agreed to defer the decision to close that part of the business for three months. He did this because he wanted to give her one further chance since a lot had been invested already in domiciliary care. The Claimant found this undermining. The domiciliary care part of the business continued to lose money and was closed at the end of the extension period.

28. The Claimant's laptop broke on 11 August 2019. It was never fixed. There were other computers he could use but the broken laptop made things less convenient particularly for out of hours work.

29. At some point in 2020 a meeting was set up with Richmond care homes. The Claimant attended but Mr Roman did not. It would have been helpful if he had attended to show the client that they were being taken seriously.

30. In around February 2020, the Claimant secured a business opportunity to provide carers to a home that specialised in caring for residents with mental health problems. This required carers to have particular training including in relation to restraint. The Claimant obtained some quotes for relevant training and passed these to Mr Roman. However, Mr Roman had his own contact which he preferred to use because it was cheaper.

31. A training day was arranged but the trainer left shortly into the session. He telephoned the care home who told him that the training needed to include restraint training. He was unable to provide it. As a result the business opportunity with that care home was lost. I find it peculiar that the trainer did not find out in advance what training he needed to deliver before agreeing to provide the training. I also find it peculiar that Mr Roman did not find this out and tell the trainer the detail of the training that needed to be delivered. Overall, it is fair to say that the matter was not very well managed.

32. In May 2020, Mr Roman sent a carer to work a 12 hour shift after she had just finished a 12 hour shift at a sister care home. The client noticed, was furious, complained and the Claimant had to deal with the complaint. In his evidence to the tribunal Mr Roman said he had no knowledge of this. The Claimant pointed out that he need only check his booking records and he would see that this had happened. Mr Roman's evidence was that he could look into (but seemingly had not to date, despite this litigation). Plainly this matter has been in issue at least since the claim was presented. I found Mr Roman's evidence evasive and I infer that the factual allegation the Claimant makes is true. It is also likely that transport would have been arranged by the Respondent to take the carer from the first shift to the second. It is thus unlikely that the double 12 hour shift happened by accident. I infer that it happened by design presumably because there was some difficulty in otherwise covering the shifts.

33. Later in May 2020, Mr Roman went to Romania for 9 weeks without telling the Claimant. Mr Roman's father was unwell and he went to assist. That is why he spent so much time in Romania in 2020.

34. On 20 July 2020, the Claimant received a call from an angry home manager. The facts underlying this call are disputed. On the Claimant's account, Mr Roman had tried to send a carer who had returned from Romania the previous day to work when she should have been self-isolating. The care home rejected her for that reason. She was then sent for a shift the next day at a sister care home. In order to facilitate this, her name was manipulated. Normally, carers are identified by first name and surname on booking spreadsheets. This is what happened on the first shift. On the second shift, however, her first name was given and her middle name was used in the column for surname.

35. Mr Roman's and Ms Howes' version of events was that the discrepancy in the carer's name was simply an accidental error. They insist that because the carer was a "key worker" there was no need for her to self-isolate. I struggled, however, to understand why she was provided to the same care home provider given that their position was that they did not want that carer since they considered she should be self-isolating. In her evidence, Ms Howes eventually said that the care home had told her on the telephone that they were willing to accept Carer B and that is why she was sent to work.

36. The Claimant said under cross examination that there had been an email complaint from the care home following the phone call, and that he had made extensive efforts to get it from the Respondent for the purpose of these proceedings. I asked Ms Younis if there had been a disclosure search for this

email or indeed any disclosure search at all. She said she was not in a position to answer there and then. I agreed for her to consider the matter over lunch. Over lunch the following email was disclosed to the Claimant and sent to the tribunal. It is from Abby Scott, HR advisor to Augustinian Care (the care home provider) and is dated 22 July 2020 with the subject line 'complaint':

> *Afternoon Steve,*
>
> *Following on from our conversation earlier I would like to put in writing my concerns with regards to [Carer B] being booking in repeatedly after recently returning from Romania.*
>
> *Romania is not a country that is exempt from 'all but essential' travel issued by the FCO. [Carer B] should be self isolating for 14 days after returning and we are not prepared to book her in at this time.*
>
> *Please see below link for travel guidance:*
>
> *https://www.gov.uk/guidance/coronavirus-covid-19-countries-and-territories-exempt-from-advice-against-all-but-essential-international-travel#exempt-countries-and-territories-list*
>
> *Please see below link for those travelers exempt from the border rules in the UK:*
>
> *https://www.gov.uk/government/publications/coronavirus-covid-19-travellers-exempt-from-uk-border-rules/coronavirus-covid-19-travellers-exempt-from-uk-border-rules*
>
> *[Carer B] is not a contracted Registered Health or Care professional therefore is not exempt.*
>
> *I was informed [Carer B] had been booked in as a name change for St Clare's on Monday 20/07/2020 to replace [Carer C].*
>
> *Sieuwke Ozkan, St Clare's Home Administrator declined [carer B] due to her recent travels and the Government guidelines.*
>
> *After Sieuwke had discussed this and the exemption criteria with Luiza, Sieuwke advised we would not have Ana work at Augustinian Care within 14 days of her travelling.*
>
> *[Carer B] was then booked at St Mary's instead!*
>
> *Our Administrators were made aware of this yesterday, that [Carer B] is not to be booked currently as she should be self isolating.*
>
> *I was then informed this morning by Lesley Watson, St Mary's Home Administrator that another name change was made last night 21/07/2020 for the night shift at 18.42 and [carer X] was replaced with [Carer B – using her first name and middle name instead of her first name and surname] by Luiza again!?*
>
> *I find this unacceptable and deceitful that [Carer B] was booked in a second time and her full name was not given.*

This has put all our staff and residents at St Mary's Care Home at risk and completely goes against Government guidelines.

I checked the staff profile with our Team Leader this morning and they confirmed it was [Carer B] who worked both Monday and Tuesday night at St Mary's.

Unfortunately this is not the first time we have been given variations of staff members names causing confusion, therefor please can I also remind everyone that we require the staff members full name and their profile prior to them arriving on site.

We don't have a profile for Virgil.

Our agency usage is minimal at present due to the current Covid-19 situation, however unless the above issues are addressed and rectified we will have no choice but to refrain from making any future bookings with APlus.

Kind regards

Abby

37. Overall, I find the Respondent's witness evidence in relation to this matter implausible and I find that the email above is the best evidence as to what happened:

    37.1. Carer B was sent for a shift and rejected because the care home provider believed she should be self-isolating;
    37.2. This was communicated in terms to Ms Howes;
    37.3. Carer B was nonetheless sent for a shift the following day at a sister care home operated by the same provider in direct contradiction to the instructions previously given by the client;
    37.4. I find it more likely than not that the discrepancy with regard to Carer B's name on the spreadsheet was no accident. It was done deliberately to increase the chances that it would go unnoticed that Carer B was being provided despite the client asking her not to be. Although I accept that Carer B was personally known to the client and thus her name was not the only way that she could be identified, manipulating her name nonetheless increased the chances that the Respondent would get away with providing her again;
    37.5. In my view it is unlikely that Ms Howes would have taken this course of action, which was deceitful, without Mr Roman's agreement and my view is that it was a course of action they agree together.

38. The Claimant was disturbed by this matter and I find that it one of the things that prompted him to try and have a serious conversation with Mr Roman.

39. In a bizarre episode, on 23 July 2020, the Claimant and his wife went to Mr Roman's and Ms Howes' family home (they were recently back from Romania). The Claimant wanted to speak to Mr Roman about the direction of the business, whether he was still committed to it and the events of preceding days. Mr Roman and Ms Howes were out with their children on a bike ride when the Claimant arrived and they returned home to find the Claimant and his wife waiting for them.

40. I have been unable to follow on what basis the Claimant thought that this was an appropriate way of addressing his concerns with Mr Roman. In my view it was highly inappropriate to go to Mr Roman's house, unannounced, uninvited, in the evening and to engage in an important conversation about work.

41. Mr Roman and Ms Hawes were baffled and left very uncomfortable with the Claimant's visit to their home. The Claimant and Mr Roman had an awkward conversation on the patio. Mr Roman expressed his ongoing commitment to the business. One thing is of particular note: I find that Mr Roman told the Claimant that he would arrange additional support for the Claimant when he (Mr Roman), Ms Howes and the administrator would all be on holiday in late August 2020.

42. On 29 July 2020, Mr Roman went to Romania again. However, the Claimant saw him on 2 August 2020 driving through the village. The Claimant messaged him and he told the Claimant there had been a change of plan (in that he had come back to the UK). Mr Roman then went to Romania again on 16 August 2020.

43. On 27 August 2020, a debt collector attended the office and threatened to take property of £1,175 was not immediately paid. The Claimant telephoned Mr Roman who did not answer. However, he immediately answered when the administrator called him. This gave the Claimant the impression that he had ignored the Claimant's call but had been willing to take another call. However, on this I accept Mr Roman's evidence. He did not deliberately ignore a call from the Claimant. Having answered the call from the administrator he immediately WhatsApp'ed the Claimant his credit card details to pay the debt. The debt itself appeared to relate to unpaid parking fines. The Respondent has not been able to get to the bottom of who incurred the fines (it has a number of work vehicles) and nor do I need to.

44. The administrator took leave between 31 August and 8 September 2020. Mr Roman and Ms Howes were also away. No additional support was provided.

45. The Claimant resigned from his role as Business Manager on 31 August 2020 on his contractual one month's notice. He worked part of that notice period and took accrued annual leave for the remainder.

Law

Constructive dismissal

46. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

47. It is an implied term of the 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"* (***Malik v BCCI*** [1997] IRLR 462).

48. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

49. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify*
> *and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61): "…the legal test is 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."*

50. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

51. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

52. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

53. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that, the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

54. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

    54.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    54.2. Has he or she affirmed the contract since that act?
    54.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
    54.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
    54.5. Did the employee resign in response (or partly in response) to that breach?

55. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

> *24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:*
>
> *"Moreover, he [the employee] 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."

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

Unfair dismissal

56. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

57. There is a limited range of fair reasons for dismissal (s.98 ERA). In a constructive dismissal case, the reason for dismissal is the reason that the employer did

whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

58. In ***Buckland***, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished ***Malik*** test applies; (ii) if 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; and (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, fell within the range of reasonable responses and was fair.

59. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. Conduct is a potentially fair reason. The test of fairness is at s.98(4), in relation to which the burden of proof is neutral.

> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
> *(a) depends on whether in the circumstances (including the size and administrative*
> *resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

60. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

61. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

Discussion and conclusions

62. The first issue is whether the Respondent was in breach of the implied term of trust and confidence. In my view it was.

63. I start by identifying which factual allegations are made out and their significance from the perspective of the relationship of trust and confidence:

    63.1. *In February 2019, Mr Roman took a holiday in Romania without telling the Claimant whilst the business was under investigation by the police*

following fraud by a former member of staff. As set out in the findings of fact this allegation is broadly made out though it was an employee not the business that was under investigation. It would have been more polite to tell the Claimant that Mr Roman was going on holiday and there was no reasonable and proper cause for not doing so. This matter was not, however, very serious and could add only something small to a breakdown of trust and confidence.

63.2. *On 8 May 2019 the Claimant told an underperforming carer that he would not be offered any further work. Mr Roman undermined him by offering the carer further work. The carer then failed to attend some shifts and forged time sheets. The Claimant told Mr Roman this but he kept the carer on.* I do not think this was a very significant matter: it did not undermine the Claimant as he seems to think. A lot of time had passed between letting Carer A go initially and subsequently him being offered further work. If anything it undermined Mr Roman since his decision to have this carer back did not work out well.

63.3. In around 7 July 2019 the Claimant and Mr Roman agreed between themselves that the domiciliary side of the business should close as it was not profitable. They met with the Registered Manager to convey the news. Mr Roman asked the Claimant to lead the meeting. After the Claimant explained the decision Mr Roman reversed it. This made the Claimant look incompetent and damaged his relations with the Registered Manager. The factual allegation is broadly made out save that Mr Roman did not entirely reverse the decision. He granted a short reprieve. I do not accept that this had the consequence the Claimant says in terms of making him look incompetent. There was no suggestion at the meeting that the Clamant had got the initial decision wrong. Rather the mood of the meeting was simply that Mr Roman was prepared to grant a short reprieve. I do not think this was a significant incident in terms of trust and confidence and in any event I think Mr Roman had reasonable and proper cause for it. It was open to him to reprieve this side of the business and give it one last chance to work if he wanted to. He had invested a lot in it and he was impressed by Katie's passion to give it one more try.

63.4. Booking records for carers were held off site which made it difficult for the Claimant to answer queries. He asked repeatedly for the system to be computerised but this never happened. I accept the factual premise of this allegation. I do not however consider it significant from a trust and confidence perspective. In any event, I accept that there was reasonable and proper cause for the state of affairs. This was a very small business which did not have all the trimmings modern technology had to offer. The business had very limited resources and personnel. Mr Roman was entitled to run the booking system on paper.

63.5. On 3 February 2019, the Claimant was summoned to a meeting by Mr Roman at 7.30pm without notice. 'Invited' would be a better word than 'summoned' but either way this incident is totally insignificant. It was a nice business dinner.

63.6. On 3 July 2019, the Claimant returned from holiday and was summoned to a meeting at 6pm. My analysis is the same as the meeting of 3 February 2019.

63.7. The Claimant's laptop broke on 11 August 2019. It was never fixed. This happened but is insignificant. There were other computers that could be used and the broken laptop was basically a minor inconvenience.

63.8. *At some point in 2020 a meeting was set up with Richmond care homes. The Claimant attended but Mr Roman did not.* I do not accept this was a significant matter. It would have been helpful if Mr Roman had attended but he had reasonable and proper cause not to attend. Ultimately if he preferred to delegate the meeting to the Claimant that was well within his ordinary managerial discretion to do so. That Claimant was sufficiently senior and competent to attend this meeting.

63.9. On 10 February 2020 the Claimant secured a business opportunity to provide carers to a home that specialised in mental health patients. Mr Roman arranged training for carers. The trainer he arranged left shortly after the training began because saying "it was the wrong training" and would be insufficient. The contract was lost because Mr Roman had scrimped on the training. The facts are broadly proven. This was capable of contributing something small towards a breakdown of trust and confidence. The Claimant had put a significant amount of work into generating a business opportunity that was then squandered. There was a degree of mismanagement here by Mr Roman for which there was no reasonable and proper cause. It would not have taken much to find out what training was needed in advance of booking the trainer and ensuring he was able to provide it.

63.10. In May 2020, Mr Roman sent a carer to work a 12 hour shift after she had just finished a 12 hour shift at a sister care home. The client was furious and the Claimant had to deal with the matter. This happened and was capable of contributing something significant to a breakdown of trust and confidence between the Claimant and the Respondent though not of itself quite serious enough amount to a breach of the implied term. It was an extremely poor way of treating the carer and indeed the client. It affected the Claimant because (a) he was associated with the Respondent since he was employed by it and this was disreputable behaviour and (b) he took the complaint about it. It is obviously inappropriate for a carer to work 24 hours straight, save in the most exceptional circumstances - none of which obtained here. There was no reasonable and proper cause for this.

63.11. In May 2020, Mr Roman left the business without warning for 9 weeks without telling the Claimant. This did happen, and, though no objection could be taken to Mr Roman leaving the business for 9 weeks of itself, it was discourteous not to tell the Claimant it was happening. This was capable of contributing something small to a breakdown of trust and confidence. There was no reasonable and proper cause for the discourtesy.

63.12. *On 20 July 2020, the Claimant received a call from an angry home manager. Mr Roman had tried to send a carer who had returned from Romania the previous day. At the time it was compulsory to self-isolate upon arrival from Romania. Mr Roman attempted to avoid this by giving a false name for the carer and placing her in a home next door to the one she usually worked in.* The facts are broadly made out but with some qualification. The Claimant accepts that there was confusion at the time about whether or not there was a requirement for carers to self-isolate in the circumstances. The matter that undermined trust and confidence is the deceit that was involved in providing Carer B to the client. The Client had told the Respondent Carer B must not to be provided until two weeks had passed following her return from Romania. It gave cogent reasons for that. The Respondent attempted to get around this clear instruction by manipulating Carer B's name on the spreadsheet. In my view, objectively, that was conduct which seriously damaged the relationship of trust and confidence between the Respondent and the Claimant. It was deceitful/disreputable conduct and it prompted an unsurprisingly furious response from the client when it was found out. That response was twice directed to the Claimant, firstly in a phone call, secondly in the email. It must have been extremely embarrassing for him to have to deal with that matter.

63.13. *On 29 July 2020, Mr Roman went to Romania again. The Claimant saw him on 2 August 2020 driving through the village. The Claimant messaged him and he told the Claimant there had been a change of plan. Mr Roman went to Romania again on 16 August 2020 and promised the Claimant support with the business whilst the administrator was on annual leave between 31 August and 8 September 2020. None was provided*. This all happened. The absences themselves are entirely unobjectionable. Mr Roman's plans were in a state of flux and he was dealing with his father's ill-health. The failure to provide support is dealt with below since it was the final straw.

63.14. *27 August 2020, a debt collector attended the office demanding money and threatening to take property of £1,175 was not paid. The Claimant telephoned Mr Roman who did not answer. However, he immediately answered when an administrator called him, leaving the Claimant feeling humiliated.* This happened, but Mr Roman did not ignore the Claimant's call he just did not see/hear it. That gave him reasonable and proper cause for not answering the Claimant's call.

64. Thus, the Respondent was in repudiatory breach of the implied term of trust and confidence. The incident with Carer B was itself sufficiently serious to breach the implied term. In the alternative, the incident with Carer B, together with the other matters I have identified as contributing something to a breach of the implied term, together amounted to a breach of the implied term.

65. In my view the Claimant resigned in response to the above events and the incident with Carer B was a matter of particular importance in his decision to

resign. This is evidenced not only by the Claimant's witness evidence (which I accept) but also by the fact that he went to Mr Roman's house on 23 July 2020. In my view it was the incident with Carer B that prompted that visit and that in turn reflects the fact that it was a significant event in the Claimant's mind. I reject the submission that he resigned solely to pursue a career in music. That is implausible for a number of reasons including that the Claimant has always pursued music alongside his primary job and there is no apparent reason why he could not have continued to do so.

66. The Claimant did not, however, resign until 31 August 2020. The Respondent submits that he thereby affirmed the contract. I do not agree. The Claimant was entitled to take some time before making his mind up as to whether or not he would resign in response to the incident with Carer B. In my view, it would not be right to infer from his conduct in continuing to work in that period of a few weeks that he had accepted the breach. Firstly, the Claimant had confronted Mr Roman on 23 July 2020 and wanted to see how things played out following that confrontation. Secondly, Mr Roman and Ms Howes were then away in Romania for most of the period between the confrontation and the resignation. It was therefore difficult for the Claimant to assess or progress matters.

67. In any event, there was a final straw on 31 August 2020 when the administrator went on holiday, Mr Roman and Ms Howes were not back from Romania and no additional support was provided. Although Mr Roman and Ms Howes had taken the on-call phone with them, in reality, the absence in the UK of any other staff made the Claimant's working life much more difficult. It was also a broken promise: the Claimant had been told that additional support would be put in place when the administrator went on holiday but it was not. In my view this was apt to be a final straw. It was not of itself a repudiatory breach but it was certainly not wholly benign or reasonable and did contribute something material to the breach. Thus even if the Claimant had affirmed the contract by delaying his resignation there was a final straw that entitled him to resign and claim constructive dismissal in any event and his dismissal came immediately following that final straw.

68. The Claimant was thus dismissed.

69. The Respondent's pleaded case is that there was a fair reason for dismissal, namely, capability, in that the Claimant could not handle the demands of the business manager role.

70. That averment was not actually pursued at trial. Ms Younis did not submit that if there was a dismissal it was for capability and that it was fair in all the circumstances (whether in her oral or written closing submissions). The case was defended only on the basis that there was no dismissal.

71. In any event, I do not accept that capability was the reason for the dismissal. The evidence does not show that the Respondent was dissatisfied with the Claimant's performance, never mind that it behaved in the repudiatory way that it did because of the Claimant's performance/any dissatisfaction with it.

72. If the reason for dismissal was capability, the dismissal was in any event unfair in the circumstances applying the range of reasonable responses test. There was no basis for concluding that the Claimant was underperforming, nothing was done to draw any underperformance to his attention and no procedure was followed prior to dismissing him.

Conclusion

73. The Claimant was constructively dismissed and the dismissal was unfair. The parties should seek to agree remedy failing which I will decide it at a remedy hearing. I will make case management orders for this under separate cover.

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Employment Judge Dyal

Date 07.02.2022