



EMPLOYMENT TRIBUNALS

Claimant: Mr M Palmer
Respondent: Mitie Limited
Heard at: East London Hearing Centre
On: 2 March 2022
Before: Employment Judge Park

Representation

Claimant: In person
Respondent: Mr S Gittens (counsel)

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The Claimant's claim for unfair dismissal is unsuccessful and is dismissed.

REASONS

Claims and Issues

1. The Claimant's claim was for unfair dismissal. The Claimant had resigned so he first needed to establish that he had been constructively dismissed.
2. In the ET3 the Respondent had queried whether or not the Claimant was also pursuing a claim for disability discrimination. At the outset of the hearing I clarified with the Claimant whether or not he was also pursuing a disability discrimination claim. The Claimant confirmed that he was not and his only claim was for unfair dismissal.

Procedure, documents and evidence heard

3. The Claimant appeared in person. The Respondent was represented by Mr Gittens of counsel.

4. A bundle of documents was provided. This had been prepared by the Respondent. It was relatively lengthy and it was agreed by the Respondent at the outset that much was not relevant to the case, such as the complete copies of some of the Respondent's policies and procedures.
5. During the course of the hearing it became apparent that there were a number of documents that were relevant to the case that had not been disclosed by the Respondent so were not in the bundle. This included a grievance raised by the Claimant on 19 July 2021, additional emails sent by the Claimant and copies of the Claimant's phone records. The Claimant had asked for these documents but the Respondent had not provided copies or included them in the Bundle, on the basis that the Respondent did not consider them relevant. I asked Mr Gittens to try and obtain a copy of the grievance during one of the breaks but he was unable to do so. I have taken into account that it is likely there was other documentary evidence that was not provided which may have been of assistance. When making findings of fact I have considered carefully whether there may be other evidence and the impact of this. Where relevant I have weighed up what that other evidence may have shown and considered whether it impacts any of my findings of fact.
6. The Claimant had prepared a witness statement and was cross examined. The respondent called two witnesses, Neil Gallagher who was the Claimant's manager, and Carl Asprey who was the Claimant's supervisor.
7. The Claimant explained at the outset that due to his heart condition he may feel unwell at points and need to take medication. I advised him to let me know if he needed any additional breaks and we could facilitate this.

Findings of fact

8. The Claimant started to work for the Respondent in 2018. He was employed as a Grounds Maintenance Operative. This involved him visiting sites to undertake maintenance work such as mowing grass and litter picking. The Claimant often worked alone on site.
9. In order to carry out his work the Claimant had a specific vehicle assigned to him. If there were any problems, such as speeding or parking fines, the Respondent would know which employee was responsible. If a fine was incurred the cost of that would be deducted from the employee's wages. When an employee changed area, the vehicle was reassigned to a different person.
10. In March 2021 the Claimant changed areas. His vehicle should have been reassigned but this did not happen. In May 2021 the sum of £60 was deducted from the Claimant's wages. This was to pay a fine, but it had been wrongly recorded as being incurred by him because the vehicle had not been reassigned. The Claimant noted this straight away and contacted the Respondent's Fleet Fines department who dealt with these types of issues. The Claimant was told the fine would be reimbursed in his next pay. The emails between the Claimant and Fleet Fines had not been provided by the

Respondent but I accepted that the Claimant had first raised the issue in the middle of May 2021.

11. The Claimant was paid every four weeks, rather than monthly. On 10 June 2021 he did not receive the expected reimbursement so he contacted his manager, Neil Gallagher. Mr Gallagher escalated the issue and the Respondent arranged for the sum to be reimbursed out of the usual payroll cycle. This did not happen immediately and the Claimant became increasingly frustrated with the situation. On 23 June 2021 the Claimant raised the problem directly with Tim Howell, the Landscape Director. By this point Mr Howell had actually approved the payment but the Claimant had not been informed of this. I find that the payment was finally made on 29 June 2021. The Respondent also paid the Claimant an additional sum of £25, which he received in his next regular pay, to compensate him for the error.
12. I was not provided with any evidence about the initial deduction or how the mix up had happened. However, there was no suggestion that it was anything other than a mistake and I find that it was a genuine error by the Respondent. The Respondent accepted there was an error and rectified the situation. I have found that although the Respondent could have reimbursed the Claimant sooner it was ultimately done within a reasonable time.
13. The Claimant had started to suffer from stress which he attributed to the difficulties with sorting out the erroneous fine. Some of the Claimant's colleagues were absent from work at the time and so there were not enough employees to cover the work. This in turn led to the Claimant feeling that his workload had increased. He informed Mr Gallagher of this and asked for help. Mr Gallagher confirmed such discussions took place.
14. I was not provided with any evidence by either the Claimant or the Respondent relating to the Claimant's workload. I cannot make any findings of fact on whether the Claimant was overworked or required to undertake more than was reasonable. I do accept though that the Claimant's feelings on this were genuine and he was stressed at the time. However, I also heard evidence from Mr Gallagher that the Claimant would take on more work than he could manage and would not accept help or advice that was offered.
15. The Claimant had stated that no help was provided. Mr Gallagher disputed this and explained the ways that he sought to help the Claimant. I found Mr Gallagher's evidence persuasive in this respect. I was provided with Mr Gallagher's phone records which indicate he was in regular contact with the Claimant. Mr Gallagher explained that assistance from another employee, Mr Hearn, was offered but the Claimant would not work with him. This was not disputed by the Claimant. On the contrary, when cross-examining Mr Gallagher, the Claimant expressly referred to his refusal to work with Mr Hearn. I conclude that Mr Gallagher did try to provide support and assistance to the Claimant in June and early July 2021 to assist with the Claimant's stress.

16. On 6 July 2021 the Claimant informed the Respondent he was unwell and sent an email to Mr Gallagher saying he had been to the doctors and advised to rest. During the hearing the Respondent suggested that the Claimant may not actually have seen a doctor, given that he was not registered with a GP at the time. I do not consider whether the Claimant had actually seen a doctor relevant at this point. What is clear is the Claimant had received some medical advice and was informing the Respondent he needed time off for his health as he was exhausted.
17. The Claimant was off work until 19 July 2021. He was not entitled to any contractual sick pay from the Respondent so took some time as unpaid sick leave and then agreed with Mr Gallagher that he would take some paid leave. The Claimant already had some leave booked so extended this to ensure he did not lose out financially. I find that this was facilitated by Mr Gallagher albeit that this would not usually be approved.
18. The Claimant returned to work on 19 July 2021. During the course of the day there were various interactions between the Claimant and Mr Gallagher and Mr Asprey. I found that the evidence from both parties on the events of 19 July 2021 was slightly lacking in clarity. Neither party provided a clear chronology of the day setting out the order of events. In this respect it would have been helpful to have had the phone records of the Claimant which would have indicated when he had called Mr Gallagher and Mr Asprey and the number of times. I have found that the following events did occur and on careful consideration I have concluded that ultimately the exact order of events is of no material consequence.
19. At some point during the day the Claimant spoke with Mr Gallagher who carried out a return to work interview. Due to Covid this was carried out remotely rather than face to face. During evidence the Claimant confirmed this discussion took place but also stated he disputed the Respondent's evidence about this meeting in its entirety. I have concluded that this discussion did take place, though I accept that the Claimant was not provided with a record of the discussion at the time. It is my finding that the Claimant's objection was to the contents of the formal record, which he had not seen or signed. However, I find that the return to work interview did take place. I also find that during this call the Claimant and Mr Gallagher discussed the Claimant being stressed and Mr Gallagher made suggestions to help. These included advising the Claimant he did not have to finish jobs if he was struggling and he should call a manager.
20. On return to work the Claimant attended a site he had worked at previously. He was unhappy at the state of the site as it appeared that no work had been carried out in his absence. During the day the Claimant started to feel stressed and unwell again. He then began to experience chest pains. He called Mr Asprey and informed him of this. Mr Asprey told the Claimant to rest. The Claimant spoke to Mr Gallagher about his chest pains later that day. Mr Gallagher also told him to rest and to go home if he continued to feel unwell.
21. During his cross examination of Mr Gallagher and Mr Asprey the Claimant asked them to explain why they did not call an ambulance as he was experiencing chest pains. I do not find there was any failing by Mr Asprey

or Mr Gallagher in this respect. I find that their responses to the Claimant when he informed them he felt unwell were appropriate. There was no indication in the evidence I heard from the Claimant or the Respondent's witnesses that when the Claimant spoke to Mr Asprey, and then later Mr Gallagher he was in a state where he required someone else to call him an ambulance. The Claimant's own evidence was that after he spoke with Mr Asprey he sat down and the pain did ease off. He continued to work and spoke to Mr Gallagher later. I also have noted that the possibility of calling an ambulance was a new issue raised by the Claimant during the hearing. It was not included in the ET1 nor the Claimant's witness statement. It appeared to me to be something that may have occurred to the Claimant in retrospect, rather than something he was concerned about at the time.

22. While the Claimant was resting he checked a work WhatsApp group for messages. On this there was a photograph of work being carried out at a site where the Claimant had worked previously. When working there the Claimant had noted that the site had brown tail moths present, which are toxic. He had raised this with the Respondent. Seeing this photograph also made the Claimant feel stressed as he believed that the brown tail moth had not been treated.
23. The Claimant called Mr Asprey again. During this call the Claimant complained about Mr Gallagher and the brown tail moth. Shortly after Mr Asprey complained to Mr Gallagher by email about the Claimant's conduct in this call, alleging that the Claimant had been confrontational and sworn on multiple times. In his evidence the Claimant also stated that he had sworn and was angry. I find that this call was as described by Mr Asprey.
24. The Claimant raised a grievance. Unfortunately, a copy of the grievance was not provided. The Claimant indicated that this was done on 19 July 2021. He lodged it via the Respondent's HR portal, which is why he did not have a copy. The Respondent also did not provide a copy. The Claimant did not explain in his evidence what was in the grievance, but the Respondent had provided some other documents which were internal notes about the matters raised. I find that the grievance included complaints about the fine, the brown tail moth and a vehicle he thought should not be used due to a fault.
25. Mr Gallagher and Mr Asprey met with the Claimant on 20 July 2021. The Claimant apologised to Mr Asprey. The Claimant was told that he would receive help and his work load would be reduced.
26. Mr Gallagher called the Claimant regularly after his return to work. Between 20-28 July 2021 he called the Claimant 6 times and also sent text messages. Mr Gallagher also visited the Claimant on site during this period. In his statement the Claimant confirmed that Mr Gallagher had visited on 22 and 26 July. In cross-examination he also stated that he met with Mr Gallagher on 23 July. During one of these meetings Mr Gallagher explained that the brown tail moths had been dealt with already.

27. The Claimant's grievance was not treated as a formal grievance and investigated. However, I find that the issues the Claimant had raised were discussed with him and addressed. He did not pursue the matter further before he resigned.
28. The Respondent arranged for an agency worker to assist the Claimant. The Claimant was not happy with this as he felt that the agency worker did not have the right experience so he had to teach him what to do. According to the Claimant working with the agency worker increased his stress levels further rather than helping him.
29. On 3 August 2021 the Claimant gave notice of his resignation. In this he stated: *"the company has failed under there duty of care to protect me from stress and my wellbeing I have had no support from my line manager or anybody else in the company also that I have worked hard over the last nearly 5 years and I have never had a pay rise"* [sic]. He worked his notice and his employment terminated on 13 August 2021.
30. The Claimant did not identify any new event that triggered his resignation. I find that he resigned because he remained stressed and he felt that the situation was not being addressed properly by the Respondent.

The Law

31. The law on unfair dismissal is set out in the Employment Rights Act 1996. The relevant provisions are 94—98. A claim for unfair dismissal can only be pursued when the employee is dismissed. Under section 94c an employee is dismissed when they terminate the contract in circumstances in which they are entitled to do so without notice by reason of the employer's conduct. This is often known as a constructive dismissal.
32. The circumstances that entitle the employee to terminate the contract without notice are as follows:
 - 32.1. there must be a breach of contract by the employer;
 - 32.2. that breach must be sufficiently important to justify the employee resigning;
 - 32.3. the employee must leave in response to the breach not some unconnected reason; and
 - 32.4. the employee must not delay as such as to affirm the contract.
33. The breach relied on can be a breach of an express or implied term. Every contract of employment contains an implied term 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 the employer and employee. Any breach of the implied term will be sufficiently important to entitle the employee to treat themselves as dismissed.
34. Where there are a number of incidents culminating in a final event the tribunal must look at the entire conduct of the employer. The final act relied

on need not in itself be repudiatory or even unreasonable, but must contribute something, even if relatively insignificant to the breach of contract.

35. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of a particular employee nor the opinion of the employer as to whether its conduct is reasonable or not.
36. If I find that the Claimant has established the above then he will have been dismissed. Section 98(1) Employment Rights Act 1996 requires the employer to show that there is a potentially fair reason for dismissal. If the employer cannot show a potentially fair reason for dismissal then the dismissal will be unfair. If there is a fair reason then I must consider whether the dismissal was actually fair. The test in section 98(4) Employment Rights Act 1996 must be applied.
37. In his ET1 and evidence the Claimant has referred to current medical conditions, including high blood pressure. He attributes these to the stress he suffered while working with the Respondent, stating that the Respondent had breached their duty of care. Any question about the potential causation of any medical conditions that the Claimant developed is outside the scope of matters that can be considered by this tribunal in the context of a claim for unfair dismissal. I will not be making any findings on this.

Conclusions

38. The first question for me to consider is which term of his contract the Claimant has alleged has been breached. The Claimant has referred in his ET1 to a breach of the duty of care. Having considered the Claimant's explanation for why he resigned I have concluded that he is relying on the implied term of mutual trust and confidence and arguing that the Respondent acted in a way likely to destroy or seriously damage the relationship of confidence and trust.
39. The conduct by the Respondent that the Claimant felt destroyed trust and confidence was as follows:
 - 39.1. the erroneous deduction from his wages in May 2021 and delay in rectifying this;
 - 39.2. being overworked, leading to him feeling stressed and having to take time off in July 2021;
 - 39.3. the Respondent failing to address the Claimant's feelings of being overworked and stressed by providing assistance either before his absence or after;
 - 39.4. the Respondent's failure to investigate his grievances about the brown tail moth, vehicle and deduction in May; and
 - 39.5. Mr Gallagher and Mr Asprey failing to call an ambulance when he told them he was experiencing chest pains.

40. I found that the deduction was made but it was rectified within a reasonable time. Looked at objectively I find that this was not an act likely to destroy mutual trust and confidence and was not a breach of contract.
41. I have not been able to make any findings of fact as to whether the Claimant's workload was unreasonably high, but I did accept he genuinely felt stressed by his workload. However, I have also found that the Respondent did take steps to assist the Claimant. Mr Gallagher was in contact with the Claimant regularly and offered support, such as advising him that he did not need to finish a job in one day if it was not possible. The Respondent also provided Mr Hearn and an agency worker to work with the Claimant, but the Claimant rejected this help. Given that the Claimant was complaining of being overworked these interventions are sensible and the type of assistance an employer could reasonably be expected to provide. I do not find the Respondent's actions in this respect were likely to destroy mutual trust and confidence.
42. I have found that the Respondent did not investigate the Claimant's grievance or treat it as a formal grievance. In some circumstances a failure to properly consider a grievance could be conduct that is likely to destroy trust and confidence. In the Claimant's case I do not find that this was the case. The Claimant resigned only 2 weeks after submitting his grievance via the HR portal. I find that a failure to formally respond to a grievance in a relatively short period is not sufficiently serious to amount to conduct that is likely to destroy trust and confidence and does not amount to a breach of contract.
43. I have found that Mr Asprey's and Mr Gallagher's responses to the Claimant when he called them on 19 July 2021 were appropriate. I concluded there was no indication that the state he was in made it obvious that an ambulance should be called. On this basis I do not find this was conduct likely to destroy trust and confidence.
44. My conclusion is that the Claimant has not been able to show that the Respondent acted in such a way that was likely to destroy or seriously damage trust and confidence. Therefore, I find that the Claimant has not shown that there was a fundamental breach of contract. The Claimant's claim that he was constructively dismissed must fail.

Employment Judge Park

22 April 2022