EMPLOYMENT TRIBUNALS

Claimant: **James Baron**

Respondent: **EasyJet Airline Company Limited**

Heard at: **Bristol via VHS** **On:** **19 - 20 April 2022**

Before: **Employment Judge King**

Representation
Claimant: Mr. David Jones
Respondent: Mr. John Platts-Mills

JUDGMENT

1. The Claimant was not unfairly dismissed by way of constructive dismissal.
2. The Claimant's claim is dismissed.

REASONS

Background

1. This is the hearing of Mr. Baron's ("C') claim for constructive dismissal against his former employer Easyjet Airline Company Limited ("R"). The claim was received by the ET on 14.05.21.

2. The Tribunal heard evidence from:

    a. Mr. James Baron, Claimant

    b. Ms. Tina Stephens, Crew Base Manager of Bristol and the Claimant's line manager from 1 September 2020.
    c. Shaun Vickery: Crew Base Manager in Luton, investigator in the

Claimant's post-employment grievance.

3. The Court has had the benefit of a bundle of 143 pages. Documents in the bundle are referred to by their page number in [square brackets]. There was also a supplemental bundle of 95 pages, which was prepared by the Respondent. The Claimant did not object to these documents being included and they were of assistance to the Tribunal. The supplemental bundle was therefore admitted into evidence. Pages referred to from the supplemental bundle are also noted in [square brackets] prefixed by the word Supplemental.

Findings of Fact

4. The Claimant was employed by the Respondent from 2006 and promoted to Cabin Crew Manager in 2009. The Claimant was based at Bristol Airport but would travel domestically and internationally as part of his role.

5. He was appointed as a Cabin Crew Line Trainer in 2011 and as a Flexi Crew Training Instructor in 2014. This involved him delivering training to new and existing cabin crew at Luton and Gatwick airport.

6. Following an interview in early 2016, the Claimant was appointed as an Uprank Crew Performance Manager ("UCPM") from May 2016.

7. The terms of his appointment as an UCPM are set out in a letter dated 7 February 2017 [55], but it is accepted by the Respondent that the Claimant was undertaking these duties from May 2016.

8. The duties of the UCPM role involved the Claimant working with the Management & Administration team (the "M & A Team") to provide cover for Crew Performance Managers ("CPMs"). This would involve doing the same sort of work as the CPMs which essentially involved managerial responsibilities for Cabin Crew, and could include queries from Cabin Crew of a HR nature, or disciplinary matters in relation to Cabin Crew. It is not in dispute that the Claimant undertook these duties.

9. In early summer 2020 the Respondent embarked on re-structuring because of the pandemic. A consultation process commenced with the Cabin Crew community in early July [57-59]. The Claimant was part of the Cabin Crew

community and not viewed as part of the M & A Team community, which he did not challenge.

10. As part of the consultation process, on 27 July 2020, all Cabin Crew, including the Claimant, were offered the opportunity to express an interest in applying for voluntary redundancy [62-64]. Under its terms volunteers would receive an enhanced redundancy payment and "good leaver" status, which had implications for anyone owning shares in the Respondent company. The deadline for acceptance was 9 August 2020 and the process closed on 1 October 2020 [65-66]. Ultimately no Cabin Crew members were put at risk of compulsory redundancy. A parallel process was commenced in respect of the M & A Team.

11. The Claimant spoke to Jan Gurr, who was the Regional Manager, in early July in relation to whether his upranked duties would continue but she was unable to provide confirmation. The Claimant then emailed Natalie Puncher, Crew Operations Manager, and Chris Bailey on 20 July 2020 [60], again seeking clarification regarding his upranking position. Ms. Puncher replied later that day confirming that she could not provide "any more of an update due to us being in consultation" [61].

12. The Claimant then spoke to Ms. Gurr again on 3 August 2020, but she did not provide any clarification. There was a further conversation on 4 August 2020, in which the Claimant says at paragraph 8 of his statement that Ms. Gurr confirmed that the role of UCPM would remain but "she confirmed that she did not know what the hours would look like".

13. The Claimant left a voice note for his colleague Lucy Garrity in which he explained the substance of his call with Ms. Gurr and I have had sight on the transcripts of that voice note [Supplemental 2]. The Claimant's frustration is clear from the transcript, but it is also clear that Jan Gurr had not been able to provide the clarity that the Claimant was seeking about the future of the upranking roles. I find that at this point in time the Respondent did envisage that the upranking roles were currently still active but no decision was taken in respect of how the role would be utilised and it is clear to me that Ms. Gurr gave no guarantees to the Claimant in respect of what, if any, upranking duties he would be required to perform.

14. Elements of the restructure were confirmed in an email from Tina Stephens on 20 August 2020 but this did not mention upranking.

15. Ms. Stephens became the Claimant's line manager on 1 September 2020. The Claimant continued to ask about upranking. Ms. Stephens says at paragraph 9 of her first statement "Crew Performance Managers were not at risk so my conversations with James were only to reflect that substantive Crew Performance Managers were not at risk and that I had no information regarding Uprankers". Ms. Stephens also says she spoke to Ms. Gurr, who informed her that a decision had not been made regarding Upranking. Ms. Stephens says at paragraph 10 of her first statement that she told the Claimant in September 2020 "there were no assurances we could offer as to whether upranking would remain or not". I accept this evidence that the Claimant was informed that no decision nor guarantees could be given to him regarding upranking.

16. On 3 November 2020, a decision was taken by senior managers to remove upranking responsibilities. On the same day, Ms. Stephens called the Claimant to inform him of this. Ms. Stephens accepted that the Claimant was upset by this news, and that he told her that Ms. Gurr had told him that the role would exist. The Claimant was told that he did not have a right to consultation as the upranking role was done on an ad hoc basis. Ms. Stephens gave evidence that she had explained the business rationale for the removal of the UCPM role and the Claimant accepted in cross examination that he understood and accepted that rationale.

17. Following this call, the Claimant emailed Michael Brown, Head of Crew Operations, to ask for clarity. Mr. Brown asked Ms. Stephens to meet with the Claimant to discuss the matter with him, and this meeting took place on 6 November 2020.

18. After the meeting, the Claimant emailed a list of questions to Ms. Stephens. Due to some time away from the business, she did not reply until 7 December 2020. She accepts that she inadvertently sent her notes in relation to the Claimant's questions to him as well as her typed replies.

19. The Claimant gave notice on 21 December 2020.

20. He raised a post termination grievance on 18 January 2021. The grievance was investigated by Mr. Vickery. It is noted that the grievance took over two months to be fully investigated and for a reply to be sent to the Claimant. Ultimately the grievance was not upheld. Under cross examination, Mr. Vickery was unable to adequately explain his reasons for not upholding the grievance and accepted that there had been delay in communicating with the Claimant.

The Law

21. A termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The employer's conduct must amount to a fundamental breach of contract, i.e. it must be a significant breach going to the root of the contact.

22. A constructive dismissal is *not* necessarily unfair. The Tribunal needs to make findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances.

23. In order for the employee to be able to claim constructive dismissal, three conditions must be met.

24. First, there must be a repudiatory breach of contract by the employer. In this case, the Claimant's argument is two-fold. First, he is arguing there was a breach of the express terms of the contract in that his job description, and therefore his contract, had been changed by the letter of letter of 7 February 2017 [55] and therefore the decision by the Respondent not to continue to employ him on the same terms amounted to a fundamental (and therefore repudiatory) breach of contract.

25. Secondly, he is relying on a breach of the 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 employer and employee" (Malik v Bank of Credit and Commerce International SA [1997] IRLR 462). Due to the nature of the trust and confidence term, every breach of it goes to the root of the contract and is therefore repudiatory (Morrow v Safeway Stores [2002] IRLR 9).

26. To establish a breach, it is not enough for an employee to show that the employer's actions have destroyed or seriously damaged trust and confidence or were calculated or likely to do so. The employer must have had no "reasonable and proper cause" for the actions in question (Amnesty International v Ahmed UKEAT/0447/08). An employee has the burden of proving that the employer had no reasonable and proper cause (RDF Media Group plc and RDF Media Limited v Clements [2007] EWHC 2892).

27. The term can extend to extremely inconsiderate or thoughtless behaviour. For example, refusing to investigate complaints promptly and reasonably is capable of falling into this category (British Aircraft Corpn v Austin [1978] IRLR 332).

28. Importantly, there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).

29. In Tullet Prebon plc v BGC Brokers LP [2010] IRLR 648, Jack J, sitting in the High Court, also said:

> *"It is in a sense circular to say that the employer's conduct must be serious enough to entitle the employee to leave. However, in considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in the employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough."*

30. In Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] IRLR 487 it was affirmed that if the Claimant is objecting to is the way that the employer exercised a discretion under the contract (to the Claimant's detriment), it is not enough for the latter just to argue that the decision was unreasonable. In order to restrict the Tribunal to consideration of the process adopted by the employer, rather than remaking the decision judicially. the Claimant must show that it was irrational under the administrative law Wednesbury principles. This is a much tougher test to satisfy.

31. In IBM United Kingdom Holdings Ltd v Dalgleish [2017] EWCA Civ 1212, [2018] IRLR 4 the Court of Appeal extended this principle to applications of the T & C term. The case arose in the specific context of changes to a pension scheme but the judgment considered the term generally and made an important distinction – if the alleged breach of the term arises from generally bad behaviour by the employer, then the normal rules above apply but if the term is being used to attack what is fundamentally an exercise of a discretion given to the employer by the contract of employment, then the Claimant must establish Wednesbury unreasonableness / irrationality as mandated by Braganza.

32. Second, the Claimant must leave in response to the breach, it must be an effective cause. The employee should leave because of the breach and this should demonstrably be the case. It is not sufficient if he merely leaves; nor is it sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him (Walker v Josiah Wedgwood & Sons Ltd [1978] IRLR 105).

33. Each case will turn on its own facts, and it is for the Tribunal to "reach its own conclusion, based on the acts and conduct of the party, as to the true reason" (Weathersfield Ltd v Sargent [1999] IRLR 94).

34. Third, the employee must not affirm the contract - an employee must make up his mind soon after the conduct of which he complains; for, if he continues his employment for any length of time without leaving, he will lose his right to treat himself as discharged (Western Excavating (ECC) Ltd v Sharp [1978] QB 761).

Consideration

The Alleged Breach of an Express Term of the Contract

35. As noted above, termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The conduct must amount to a fundamental breach of contract, i.e. a significant breach going to the root of the contact.

36. The Claimant contends that the letter of 7 February 2017 [55] changed his contract, and when the role of UCPM was removed this was a fundamental breach of contract.

37. The letter states:

> *Subject to the conditions detailed in this letter you will now be required to be available to uprank to Crew Performance Manager as and when the business needs you. This is likely to be to cover absence, leave or any other operational need.*

You will continue to operate in your substantive role of Flexi Crew Training Instructor and you will continue to be monitored to ensure that your overall performance still meets that required of a Crew Performance Manager and you will receive support from the Base Management Tearn in the form of on the job training.

38. The letter goes on to state:

Please confirm you have read and accept these changes to your terms and conditions by signing both copies and returning a copy of this letter to your Base Support Administrator for the attention of the HR Service Centre within 10 days of the date of this letter.

39. This paragraph, in my view, confirms that there is some change to the Claimant's terms and conditions when he became a UCPM.

40. The question the Tribunal must consider is, when the Respondent removed the upranked role from the Claimant, did this amount to a fundamental breach of his contract, given the changes that had been made to it?

41. I note that the letter clearly states "*You will continue to operate in your substantive role of Flexi Crew Training Instructor"* and that the UCPM role means that the Claimant was told he was "*to uprank to Crew Performance Manager as and when the business needs you".*

42. There has been some discussion as to whether there was a minimum number of days that the Claimant would be required to "uprank" for. The Claimant's evidence was that he thought it was 30 day, but he could not say for sure. He initially said this was a guaranteed number of days, but later say this was a recommendation so that "upranked" crew such as himself would remain competent in the role.

43. Tina Stephens, when questioned on this point, said the number of days was used as a planning tool and was not a guaranteed amount nor a recommendation. She was unsure if the number was 30 or 35 days.

44. I note from the letter of 7 February 2017 that it contains the paragraph:

Based on the current salary, you will be paid a standard office day rate for every day that you are upranking for periods of up to 30 consecutive days. Should you be required to operate for more than 30 consecutive days, a further letter will be sent to you confirming the impact on your salary

45. In the absence of any evidence to the contrary, it is my view that this is the mention of a 30 day period that the parties are referring too. In my reading of the above paragraph, I do not find that it can be interpreted in any way to mean there was a minimum number of days that the Claimant would perform the UPCM role. It was on an "as required" basis.

46. I am happy to accept that the Claimant was passionate and committed, and I understand his evidence that the upranking to CPM was something he felt he could not leave in the office and that he always acted as a professional CPM should when around the Cabin Crew, but on the facts above I cannot find that the UCPM role was a fundamental part of his job. It was performed on an 'as and when' basis, in accordance with the business needs. There was no change to his substantive role, and therefore when the UCPM role was removed this was not a significant breach that went to the root of the contract.

47. I also accept the argument of the Respondent, which is supported by the Claimant's pay slips, that the UCPM role did not bring the Claimant significantly more income and in many month he earned less than he did when in the solely in the Flexi Crew Training Instructor role, owing to the fact that he could earn more in sector pay. I do not find that the removal of the UPCM role made a material different to the Claimant's net salary and so I do not find it was a fundamental breach in that regard.

48. There has been no evidence put forward by the Claimant to suggest that the Respondent acted irrationally in removing the UCPM role and I do not find that to be the case.

The Alleged Breach of the Implied Terms of the Contract

49. The Claimant appears to me to be relying on the 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 employer and employee" (Malik v Bank of Credit and Commerce International SA [1997] IRLR 462).

50. The Claimant's position is that he spoke to Ms. Gurr in early July in relation to whether the Respondent would continue to exercise its discretion to uprank him, and he says Ms. Gurr was unable to provide confirmation. Ms. Puncher subsequently confirmed that the position in respect of upranking would be clarified on completion of the consultation [61] – a consultation that did not end until 1 October 2020.

51. As noted above, the Claimant spoke again to Ms. Gurr on 3 August 2020, where she reiterated that she could not provide any further guidance, and again on 4 August 2020, where he was told that the UCPM role would remain but there could be no guarantee of hours.

52. The option to apply for voluntary redundancy closed on 9 August 2020. By this point, I find that the Claimant must have been aware that there was uncertainty regarding the upranking position, and however much he hoped to the contrary, he would have been aware that there was no guarantee of upranking hours been available in the future.

53. In the event, the Claimant did not apply to take voluntary redundancy and continued to look for clarity regarding the UCPM role.

54. It appears to me that the Claimant's case is that firstly, in the delay by the Respondent in confirming whether or not the upranking roles would continue, and secondly, by essentially reneging on the assurance given by Ms. Gurr on 4 August 2020, that the Respondent has 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, and therefore his resignation on 21 December 2020 should be construed as an unfair constructive dismissal.

55. It is the role of this Tribunal to apply the law as it stands, guided by statute and the relevant binding cases. I note there will be no breach simply because an employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held. As set out above, the test for unfair constructive dismissal is an objective one, and if, on an objective approach, there has been no breach then the employee's claim will fail. The Tribunal must therefore look objectively at all the circumstances.

56. It is clear to me that the Claimant was passionate and committed to the UCPM role, as well as seeing it as part of his career progression, and I do accept his

evidence that there was some gravitas in relation to the UCPM role and that the Cabin Crew would have looked up to him.

57. I also accept the evidence of Ms. Stephens that, during her conversation with the Claimant on 3 November 2020, and again at the meeting of 6 November 2020, she assured the Claimant that he was still part of the succession planning for the Respondent. This was further reiterated in her replies to the Claimant's question on 7 December [74]. The Claimant accepted in cross examination that this was said, but he said that by this time he had "started to doubt everything".

58. I am guided by Tullet Prebon plc v BGC Brokers LP [2010] IRLR 648, which provides that an employer's conduct "must be such as so to damage the employee's trust in the employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough".

59. I acknowledge, as does the Respondent, that there was delay on their part in communicating with the Claimant. While I understand that the Claimant was upset with how he felt the Respondent had treated him, I find that the Respondent still wanted to work with the Claimant and made this clear to him. In particular, I accept the evidence of Ms. Stephens that she assured the Claimant that he was still part of the succession planning during her meeting of 3 November, and this is reiterated in her email of 7 December [70]. The Claimant may have felt differently but on an objective reading of the evidence I cannot find that the conduct of the Respondent was such that the Claimant could not have been expected to continue working there.

60. The Claimant stated in his evidence that he viewed the email of 7 December [70] as 'the last straw'. He did not resigned until 21 December. I note from his evidence that the job vacancies at Jet2, as a result of them moving to Bristol airport, were available around this time. The Claimant said he could not recall when exactly he had seen an applied for the vacancy with Jet2. He says, and I accept, that it could not have been before 11 November as the announcement regarding Jet2 moving to Bristol was not made until that day. He could not recall if he saw and applied for the vacancy days or weeks after this date.

61. The Claimant accepted that his new role at Jet2 suits his personal circumstances as it is based in Bristol, where the Claimant now lives with his family, and does

not require him to travel. It also doesn't not involve flying, and it is clear in my view that the Claimant's preference was to move away from flying and to a ground-based role even when he was employed by the Respondent. I conclude that the Claimant had become dismayed with his career prospects at EasyJet and had already decided to move to a role that suited his circumstances better. I therefore do not find that the alleged breaches on behalf of the Respondent were an effective cause of Claimant's resignation on 21 December.

62. I also accept the evidence of Mr. Vickery, at paragraph 20 of his statement, this must all be viewed in "the unprecedented circumstances as a result of the pandemic" the Respondent "had to make difficult decisions in order to ensure the business's survival". The Respondent needed to manage its workforce in light of the unprecedented circumstances of the pandemic and I don't find that the Claimant has established that the Respondent had no "reasonable and proper cause" for its actions. The business need to ensure that everyone was fully aligned to their substantive roles was not an unreasonable on in the circumstances.

63. The claim for unfair constructive dismissal therefore fails.

Employment Judge King
Date: 29 April 2022

Judgment sent to the parties: 19 May 2022

FOR THE TRIBUNAL OFFICE