



EMPLOYMENT TRIBUNALS

Claimant: Kevin Ripton

Respondent: ABM Aviation UK Limited

Heard at: East London Hearing Centre by CVP

On: 29 March 2022

Before: Employment Judge F Allen

Representation
Claimant: In person
Respondent: Mr O'Neill of Chambers O'Neill Solicitors Ltd

RESERVED JUDGMENT

The complaint of constructive unfair dismissal fails and is dismissed.

REASONS

[All page references are to the agreed bundle]

Preliminary matters

1. The case was called on at 10am and Mr Ripton, the claimant, initially had some technical issues. These were sorted out by Mr Ripton leaving and then re-joining the hearing. Once Mr Ripton had re-joined and before proceeding, I checked that both parties and the witnesses could hear and see me clearly. No further technical issues arose during the hearing.
2. The respondent had two witnesses Mr Reece Gevaux-Adams who is employed by the respondent as a Ramp Coordinator at Stanstead Airport and Allison Tarran who is employed, by the respondent, as an HR Assistant. Also present with the two witnesses was Mr Stephen O'Rourke acting as a note taker. Mr Ripton said he had no objection to Mr O'Rourke being present.

3. The respondent had prepared an agreed bundle [1-124 pages], statement pack [S1-S37], chronology and list of issues. Mr O'Neill made two amendments to the chronology adding in that the claimant was on furlough between 27 March 2020 to 26 June 2021 and that on 2 September 2021 at 18.30 the claimant had sent an email to Karen Andrews [this email appears at page 59 of the bundle]. Mr Ripton agreed the amended chronology and the list of issues.
4. I was directed by Mr O'Neill to the following pages in the agreed bundle 77-79, 87, 110-123 (additional pages sent through on morning of the hearing and added to the agreed bundle), the statement pack containing the witness statements, the agreed chronology which also lists corresponding pages in the agreed bundle and the list of issues. Mr Ripton had no additional pages that he wanted me to consider.
5. Mr O'Neill asked for clarification of the issues as frustration of contract had also been raised by the claimant. Mr Ripton said he was not pursuing this.

Introduction

6. The respondent, ABM Aviation UK Limited, is an established national company providing passenger, security, coaching, cleaning and retail services to airports and airlines. The claimant was employed, at the relevant time, by ABM Aviation UK Limited as a Ground Handling Agent (Baggage Handler) at Stanstead Airport and processed bags that are checked in for departing (outbound) flights.
7. The claimant resigned on 6 September 2021. The basis of the claim is that the claimant was told to undertake a shift that was beyond him and impossible to do. The shift was impossible due to the amount of work and although he had raised this with his employer, the respondent had failed to deal with his complaint properly. This behaviour/conduct of the employer resulted in a breach of trust and confidence such that the claimant resigned resulting in this claim for constructive dismissal.
8. I heard evidence from the claimant and the two witnesses Mr Reece Gevaux-Adams and Allison Tarran. Allison Tarran gave evidence having sworn on the Lutheran bible and Mr Gevaux-Adams and the claimant both gave evidence having affirmed. The claimant [S1-S27], Mr Gevaux- Adams [S33-S37] and Allison Tarran [S28-S32] had prepared witness statements which were adopted and both the claimant and Mr O'Neill had the opportunity to ask questions. The claimant said that he was no longer relying on paragraphs 49 (1) and (2) of his statement [S15]. I then heard submissions from both the claimant and Mr O'Neill.
9. I have carefully considered the contents of all the statements, evidence that I was referred to and the submissions of both parties. In my reasons below I have not referred to each point raised or to every document referred to, but I have dealt with the points and evidence that are relevant to the issues that I must decide.

Findings of Fact

10. The claimant initially worked for Menzies Ground Handling and started work with Swissport on 4 June 2018. When working for Swissport the claimant worked two 13 hour shifts inclusive of a one-hour break from 12.00 (midday) to 1.00am (next day) on Friday and Saturday of each week. This shift agreement had been reached between the claimant and Menzies (and then honoured by Swissport) and meant the claimant was able to care for his fragile parents [51].
11. On 1 February 2019 the claimant transferred to the respondent with the same contracted hours of employment.
12. On 27 March 2020 to 26 June 2021 the claimant was placed on furlough.
13. On 28 June 2021 Allison Tarran was given the task of contacting all flexible shift workers, including the claimant, to see if they were able to return to work full time or on regular shift patterns. This was part of a general review as staff were returning to work after furlough and the shape of the business had changed. There was a telephone conversation on 6 or 7 July 2021 between the claimant and Allison Tarran when the claimant confirmed that his situation had not changed, and he was unable to work full time or on a regular shift pattern as he has to care for his elderly parents. The claimant needed to work Friday and Saturday.
14. On 13 July 2021 Kate Newcombe (Customer Service Director for Stansted and the Northern Airports) suggested that the claimant be asked if he could move to an earlier shift but on the same days.
15. On 22 July 2021 Allison Tarran spoke to the claimant about this change in shift start and end times. By email on 22 July 2021 the claimant refers to this earlier conversation with Allison Tarran and says that he is happy to switch to an earlier start time but would appreciate if this could be as late as possible. On the same day Allison Tarran responds by email saying that it has been agreed that the claimant will be allocated a 3.45am start when possible although operational requirements, such as cover for holidays, may require a 2.30am start. The claimant responds the same day thanking Allison Tarran.
16. On 28 July 2021 Allison Tarran emailed the claimant and attached a letter dated 27 July 2021 detailing the new shift times. The letter set out that the shift times will change to 2.30-15.30 and 3.45-16.45 on Friday and Monday with effect from 1 August 2021. This was incorrect as the claimant's days of work are Friday and Saturday. On the same day the claimant responded saying that the letter set out one shift as starting at 2.30am whilst he had requested a later start of 3.45am although the main problem for the claimant was that he worked Friday and Saturday and not Friday and Monday. The claimant stated that he had worked for the past four years on these days. The claimant asked for the matter to be resolved or he would get a legal opinion [45-47].

17. Ten minutes later Allison Tarran replied by email and apologised saying that the reference to Monday was an error on her part and his days were not changing and further that he would be rostered to work the later shift where possible. The email ends that the letter will be resent and apologising for the error and any upset and stress it may have caused. The claimant was emailed again with a corrected letter and the claimant responded saying "Great!"[42-44].
18. The claimant had his first new shift on 21 August 2021 starting at the later time of 3.45am. On 22 August 2021 the claimant emailed Allison Tarran, who was on annual leave, saying that the hours he has to work place him "into the teeth of the busiest times on both the hours that they cover and the days that are covered." The claimant said he was physically wiped out and that it was inconceivable to do this shift on a two day rolling basis. The claimant asked for a solution otherwise he would have to resign which wouldn't be a choice.
19. On 31 August 2021 Allison Tarran returns from annual leave and forwards the claimant's email to Karen Andrews (Base Manager) and Kate Newcombe (Customer Services Director Stansted and Northern airports) asking how she should respond. On 31 August 2021 Allison Tarran responded, saying that his hours were changed to reflect the times that the business needs staff and that he is working at times when it is most busy as this is needed to meet operational demands. In response to this email the claimant emailed Allison Tarran saying that the issues which he had raised in his email of 22 August 2021 had not been addressed and that from 3 September 2021 he would revert to his old hours of 12.00pm to 1.00am Friday and Saturday.
20. On 2 September 2021 Karen Andrews emailed the claimant stating that he cannot revert back to his previous shift pattern as this no longer works for the operation and that staff cannot come in on a shift that they are not rostered for [55]. On the same day the claimant responded to Karen Andrews saying that if he cannot attend work for a contracted shift that is not rostered then he will not attend work but claim compensation. The claimant continues that he wants to resolve this but if he is being dismissed, he wants this confirmed and he intends to get legal and union advice.
21. On 2 September 2021 Karen Andrews asked the claimant to come to the office on 3 September 2021 to discuss the matter and the claimant responds, noting her out of office reply, and asks to speak to Karen Andrews at 2pm on Monday 6 September 2021. On 6 September 2021 at 08.25 Karen Andrews responds saying she is free at 14.30pm. At 9.09am the claimant resigns [60-62]. The claimant sends a further email at 12.14 correcting his resignation letter at line 7 & 8 so that "flexible" employment should be "part time and fixed"[63].
22. On 22 September 2021 ACAS process started. ACAS issue a certificate on 1 October 2021 and the ET1 is lodged on 28 October 2021. The claim is in time.

The Legal Issues

23. The claimant claims constructive unfair dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 and asserts a breach of the implied term of trust and confidence [103]. The burden of proof is on the claimant.
24. The legal issues to be determined are set out in the agreed list of issues, namely:
- (i) Has there been a breach of the implied term of trust and confidence?
 - (ii) Is that breach fundamental? Does it go to the heart/root of the contract?
 - (iii) Has the Claimant resigned in response to that breach or for another reason?
 - (iv) Has the Claimant affirmed the contract through delay or otherwise?
 - (v) Even if the dismissal is constructive, is the dismissal unfair or does the Respondent have a potentially fair reason to dismiss? The Respondent says it has a fair reason of conduct or SOSR.
 - (vi) If the Respondent has a potentially fair reason to dismiss, did it act reasonably or unreasonably in the circumstances and in accordance with the equity and substantial merits of the case (section 98(4) ERA 1996)
 - (vii) If the dismissal is unfair, what compensation should be awarded under the normal principles.

The Law

25. Sections 94 and 95 of the Employment Rights Act 1996 state:

94 The Right

- 1(1) An employee has the right not to be unfairly dismissed by his employer.

95 Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - ...
 - (b) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

26. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA it was found that:
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”
27. The implied term of trust and confidence as formulated in *Malik and Mahmud v BCCI* [1997] ICR 606 is 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.”
28. In *Frankel Topping Limited v King* UKEAT/0106/15/LA the Employment Appeals Tribunal warned about setting the bar too low and made clear that acting in an unreasonable manner is not sufficient.
29. 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] IRLR 35, CA.

Conclusions

30. As set out in the agreed list of issues at paragraph 24 above, the first question that I must consider is whether the respondent has breached the implied term of trust and confidence? I will need to decide if the respondent has behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. If I find that they have then I must decide whether the respondent had a reasonable and proper cause for such behaviour.

Has the respondent breached the implied term of trust and confidence **Being told to undertake a shift**

31. The claimant agreed that he had accepted being re rostered and I find that the new shift pattern was a negotiated variation of the claimant’s previously agreed shift pattern such that his new hours would be Friday 2.30am-15.30pm and Saturday 3.45am to 16.45pm. This is shown by the series of emails at pages 38-39 and 47 of the agreed bundle and the claimant’s statement at paragraph 85 refers to there being a new contract. The possible change of shift patterns was initiated by the respondent due to a change in operational needs and the claimant clearly understood and agreed to these new start and end times. I accept the evidence of Allison Tarran, that nobody was forced to change their working patterns and not

everybody Allison Tarran contacted did agree to a change in their work patterns.

32. I was not provided with any previous contract of the claimant but can see from page 110 that Swissport did not provide a contract to ABM Aviation UK Limited on the claimant's transfer. In any event I find, regardless of the terms of any previous contract, that the claimant and respondent entered into a new agreement which varied the start and end times of the claimant's shifts on Friday and Saturday.
33. There is no evidence that the claimant felt under any duress to agree to these new start and end times and I note that the claimant withdrew this allegation by email on 8 March 2021 [106].

Shift beyond him and impossible to do

34. Having agreed to a new shift pattern effective from 1 August 2021 the claimant had his first shift on 21 August 2021. It is clear from his email of 22 August 2021 that the claimant found this shift challenging and says he was physically wiped out. The respondent accepted at the hearing that this had been a tough shift. The claimant has worked as a baggage handler for many years and would, I find, be aware of the busiest times and that some shifts can, for various reasons, be more difficult than others. The claimant provided a photograph [34] which shows bags jammed up but accepted that this photograph was taken not on the 21 August 2021 but when he had worked for Swissport. In addition, in his resignation letter the claimant speaks of working for previous employers when there were "phenomenally busy times" and recalls a time when a previous company that he worked for was incredibly understaffed and he and one other colleague looked after 8 shutes each [62] and his statement at paragraph 17 speaks of problems when there are belt machinery breakdowns.
35. However, it is also clear from the evidence, and I find, that the claimant undertook two further shifts on 27 and 28 August 2021 which were two in a row and that the claimant made no complaint about these shifts being difficult, impossible or beyond him. The claimant stated at the hearing that he had complained about these shifts to supervisors but had forgotten to put this in his statement. However, there is no mention of any difficulties with these shifts in his emails following these shifts and I accept the evidence of Mr Gavaux-Adams that no complaints from the claimant related to his shifts on 27 and 28 August 2021 have been received.
36. I heard detailed evidence from Mr Gavaux-Adams, which I accept, that baggage handlers working in the undercroft have up to four allocated shutes at one time and that the shutes are allocated next to each other. Baggage projections are carried out by experienced planners and the undercroft is staffed accordingly. Mr Gavaux-Adams sets out and explains in his statement at paragraphs 11-20 the data provided in the bundle at pages 77-79 relating to the volume of baggage and staff numbers and how these fluctuate during a shift and, in answer to questions from the claimant, explained shute allocation as shown on page 111. It was pointed out by the claimant that the figures in the last column under the heading averages on

page 79 were incorrect. These were corrected by the respondent and the agreed correct figures are shown at page 214.

37. As explained by Mr Gavaux-Adams the data at pages 77-78 cover Friday and Saturday for July and August 2019, January 2020 and July and August 2021. The data shows that between 22.00pm and 3am there are no bags per hour (January 2020 is an exception to this but shows a very small number of bags of between 8 to 29 bags in total at 22.00pm), that numbers of bags start to increase with a first wave between 5.00am and 8.30 am and peak around 6am. Numbers of bags then decrease with a second wave and small peak at 12pm and third wave with small peak at 17.00pm. The claimant's new shift pattern meant that he would be working for the first two waves but miss the third wave. Under the old shift pattern the claimant would start work at the time of the second small peak, be there for the third small peak and as explained by the claimant when he took me to the data at page 77 for 16 August 2019 for some of his shift there were no bags (22.00pm -1.00am). I accept that during the quiet periods the claimant did other work to help out including retrieving and charging buggies, loading dollies in the undercroft, checking the belt for large luggage and stacking twilight bags.
38. I accept and find from this data that if the claimant starts at the later start time that he requested then he starts his shift when bags start to arrive at 4am and there are no times during his shift when there are no bags to process.
39. Using the data for 16 August 2019, at page 77, I find that on his old shift between 12pm and 1am there were 5002 bags. Comparing this with the data at page 78 on 21 August 2021 for his new shift (if starting at 3.45am) there were 5947 bags, on 27 August 2021 4739 bags and on 28 August 2021 5033 bags. With a start time of 3.45am (to 16.45pm) it means that the claimant starts work as bags begin to arrive at around 4am. I further find that the volume of baggage fluctuates during the year, dropping off at the end of August each year but increasing with half term holidays, Christmas and Easter.
40. It can also be seen from the data and I find that the total number of bags fluctuate from day to day with the total number of bags on 21 August 2021 being 6322 whilst on the 27 August 2021 (The claimant's second day on the new shift pattern) the total was 5153 whilst on 14 August 2021 it was 7494.
41. With the corrections made to page 79 the data itself at pages 77-78 and 124 is not disputed by the claimant but what is in dispute is Mr Gavaux-Adam's interpretation of the data. The main dispute revolves around the bags per person calculation as the claimant says that the figures do not reflect the number of staff who were actually stacking the bags and there are about 6 to 7 undercroft staff who do not stack bags. I accept and find that the staff figures set out in the tables at page 73, paragraph e show the gross number of staff working on those particular days in the undercroft and include staff who were not working as baggage handlers stacking bags. My reason for finding this is that the data on page 73 all show higher numbers of staff working than the figures shown on page 124 under the heading UC staff per

day (UC being Undercroft). For example, on page 73 on 21 August 2019 there were 66 people, on 27 August 2021 62 people and on 28 August 2021 (incorrectly typed as 28/07/2021 as under the August 21 heading) there were 60 people.

42. The data on page 124 is specifically dealing with data to show the number of bags per person per day and the average per month. On 16 August 2019 the number of UC staff was 55 and bags per person (baggage handler) was 184.78 (average per baggage handler for the month of August 2019 being 192.16) compared to UC staff of 37 and bags per person was 170.86 on 21 August 2021 (average for the month of August 2020 being 155.96). On 27 August 2021 there were 39 UC staff and bags per person of 132.13 and on 28 August 2021 40 UC staff with 140.55 bags per person.
43. This means and I find that the figures on page 124 for UC staff per day reflects the actual number of staff in the undercroft who are baggage handlers and stacking bags and this data confirms that, the number of bags per baggage handler was lower on 21 August 2021 then on 16 August 2019 and the average monthly figure for bags per person was lower for July and August 2021 when compared to July and August 2019. Even if I am wrong on this and the number of UC staff on page 124 needs to be reduced by 6 or 7 people, this would not affect my finding that the number of bags per baggage handler was lower on 21 August 2021 then on 16 August 2019.
44. Finally, even if the numbers of bags per baggage handler increased this does not mean that the allocated shift is impossible to do. As I found above, at paragraph 38, if the claimant does the 3.45am shift start then there are no times during his shift when, as before, there are no bags to process. Allison Tarran accepts at page 52 that the claimant's workload has increased but, the fact of an increased workload on a shift does not mean that the shift is impossible to do. It was the claimant himself who negotiated the later start time and I accept the evidence of Mr Gavaux-Adams that baggage handlers such as the claimant, starting at 3.45am would have a break after the first wave and the second break would be around 12pm even though this correlates with the second peak. In addition, there are informal breaks which are not recorded. I accept that the number of bags fluctuates during a shift but staffing levels are designed to address the fluctuation in baggage levels with staff arriving at 11.30am (to finish at 20.30) and 13.00 (to finish at 22.00). I accept that Mr Gavaux-Adams has checked with HR and there are no complaints about excessive work levels apart from this one from the claimant.
45. The claimant states in his emails to the respondent that it was impossible to do this shift and two shifts in a row, yet he did do just this on 27 and 28 August 2021 with no complaint. I find that, on the evidence presented, the allocated shifts are not impossible to do.
46. Having concluded, for the reasons set out above, that the claimant and respondent entered into a new agreement which varied the start and end times of the claimant's shifts on Friday and Saturday and the allocated shifts were not impossible to do, I find that the respondent has not breached the implied term of trust and confidence.

Dealing with the complaint

47. I find that the way the respondent dealt with the complaint of the claimant did not breach the implied term of trust and confidence. Although the claimant said in his emails that he wanted a solution it is not clear from the emails what solution was being proposed and I find that it was not open to the claimant to unilaterally vary his amended shift pattern and revert back to his old hours without discussions with and agreement of the respondent.
48. The claimant emailed Allison Tarran on 22 August 2021 and accepts she was on annual leave. On 31 August 2021 Allison Tarran, on return from annual leave, actions the claimant's email. The claimant has not suggested that between 22 August 2021 and 31 August 2021 he made any attempt to follow up his email.
49. The respondent arranged for the claimant to come in to discuss the situation on 6 September 2021 but the claimant instead of attending the meeting resigned. The claimant's resignation letter says that ABM showed no signs of considering whether his complaint had merit and that "employers and employees have a responsibility to treat one another reasonably" but this fails to consider that the respondent acted reasonably in arranging a meeting at which the claimant could discuss his concerns.

Judgment

50. I find that the respondent has not breached the implied term of trust and confidence.
51. Having reached this conclusion, I do not need to go on and consider the remaining issues in the agreed list of issues set out in paragraph 24 above.
52. The claimant was not dismissed but resigned without notice and in breach of contract. To show some damage to the relationship is not sufficient and the identified conduct of the respondent did not amount to conduct that would damage the claimant's trust in his employer such that he should not be expected to continue to work for the respondent.
53. The claim for constructive unfair dismissal fails and is dismissed.

Employment Judge F Allen

13 April 2022