



EMPLOYMENT TRIBUNALS

Claimant

Respondent

DAVID MARTLEW

v

ABM CATERING LIMITED

FINAL HEARING

Heard at: **Birmingham Employment Tribunal**

On: **10 & 11 May 2022**

Before

Employment Judge McCluggage

Appearances

For the Claimant

In person

For the Respondent

Mr Lawrence (counsel)

REASONS

Introductory matters

1. This case involves a claim for unfair dismissal. Mr Martlew, the claimant, sent his Claim Form to the Tribunal on 16 June 2021.

2. I was provided with an agreed hearing bundle of 123 pages and several witness statements. The following witnesses gave oral evidence and were cross-examined upon their statements:
 - a. The Claimant
 - b. Sharon Delahunty, the Respondent's General Manager

- c. Jason Jones, the Respondent's Head Chef
 - d. Patricia Pennell, a Kitchen Assistant
3. At the outset of the hearing, I explored the issues. It was agreed that the Claimant's employment had terminated on 20 April 2021 when he sent a resignation letter. The issues were therefore:
- a. Was there a breach of the implied term of trust and confidence such that the Claimant was entitled to treat himself as dismissed?
 - b. If so, did the Claimant leave in response to that breach?
 - c. If so, was the dismissal unfair?
4. By agreement between the parties and with my consent, the Respondent's witnesses were called first.
5. The Claimant's case in essence, as explained by him in his ET1 and at the outset of the hearing was that he was treated badly by the Respondent in particular through the actions of Mr Jones, the head chef. He complained that animosity arose at work in early 2021 typified by lack of conversation and abruptness from Mr Jones such that he felt alienated within the kitchen. He received he says unfair criticism over preparation of food. Mr Jones' negative body language was said to be unpleasant and coupled with bullying, sarcastic and humiliating comments. He says he complained to the general manager, Ms Delahunty, but this was ignored. There was no 'last straw' but merely a feeling of getting generally more alienated which he felt forced him to leave employment.

Law

6. This is what is usually known as a 'constructive dismissal' case though those words do not appear in the relevant legislation, the *Employment Rights Act 1996* ('ERA 1996').
7. Section 95(1)(c) of ERA 1996 determines whether there has been a dismissal in a resignation case:

For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

.....
(c) 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.

8. For an employee to be so entitled, it is well established that the employer's conduct must amount to a repudiatory breach of contract, so entitling the employee to treat himself as dismissed: *Western Excavating v. Sharp* [1978] IRLR 27. The issue is not simply a question of whether the employer's behaviour has been unreasonable.
9. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
10. The employee must leave in response to the breach and not for some other unconnected reason. He 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. Waiver is not raised as an issue in this case.
11. The focus is on the employer's conduct and not the employee's reaction to it. Accordingly it is no defence to a claim for constructive dismissal for the employer to argue that the employee failed to raise a grievance in response to the employer's conduct, though that may be a relevant part of the factual background.
12. In this case, the Claimant relies upon a breach of the implied term of mutual trust and confidence. The classic formulation of the implied term of mutual trust and confidence is contained in *Malik v. BCCI* [1997] ICR 606 is as follows:

'The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'
13. The test is objective: the employer need not have intended to destroy trust and confidence but it is insufficient merely that the employee subjectively feels trust and confidence is destroyed no manner how strongly or genuinely that view is held. Authority for that proposition is *Omiljau v. Waltham Forest London Borough Council*

[2005] IRLR 35 and also a case cited by Respondent's counsel, *Tulett Prebon plc v. BGC Brokers* [2011] IRLR 420. In the latter case it was held by the Court of Appeal that one must look at the circumstances objectively, that is, from the perspective of a reasonable person in the position of the innocent party.

14. Capricious and inequitable treatment to a single member of staff can constitute a breach of the implied term: *FC Gardner Ltd v. Beresford* [1978] IRLR 63. Given the nature of the Claimant's complaints it is relevant to consider that guidance.
15. Where there are mixed reasons for leaving employment, a repudiatory breach of contract need not be the sole cause providing it is an effective cause: *Jones v. F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493. In *Nottinghamshire County Council v. Meikle* [2004] IRLR 793 the Court of Appeal held it was sufficient that the employee resigned in response at least in part to the fundamental breach of contract by the employer.

Facts

16. After hearing the evidence, I found the following facts:
 - 16.1 The Claimant commenced employment as a breakfast chef in January 2019 for the Respondent. Mr Jason Jones was the head chef for the whole of the Claimant's period of employment.
 - 16.2 The Respondent ran the canteen at the premises of the well-known bookmakers Bet365 in Stoke-on-Trent.
 - 16.3 It was not disputed that up until about January 2021 the Claimant's work was satisfactory. In early 2020 the Claimant was interviewed during an investigation into another employee and stated that he loved working for the Respondent in general. In the documentary evidence of that interview, he praised Mr Jones noting that when Mr Jones was in work the kitchen was organised but not if he was not there. I inferred from this that the Claimant's view at that time was that Mr Jones had standards which he expected to be adhered to. The Claimant expressly stated that Mr Jones had to assert his authority in the kitchen but that was challenged by some other members of staff. The Claimant said that he felt supported by Mr Jones.
 - 16.4 In late 2020 the Claimant experienced personal problems out of work which included splitting with his partner and a consequential need to find new

accommodation. This was a period of upheaval, stress and anxiety for him, as explained in his later grievance email of 16 April 2021.

- 16.5 Mr Jones the head chef was sympathetic and helpful to the Claimant during this difficult time, at least until January 2021. The Claimant made no complaints about Mr Jones prior to that date. The Claimant was permitted to take holiday leave flexibly in order to sort out housing problems. Screenshots of texts in the bundle corroborated that Mr Jones was adopting a supportive attitude. Mr Jones openly invited the Claimant to contact him if he needed to and the Claimant thanked him saying “thanks Jason... sometimes just someone to talk to helps”.
- 16.6 There were some occasions when the Claimant needed to make private calls during working hours and Mr Jones tolerated this. He was given latitude to take some half days off for appointments. The Claimant sought to minimise these incidents of assistance. I found that the Respondent’s behaviour here was as one would expect from a responsible employer. It would not lead to a conclusion that the Respondent was bending over backwards to help but was merely taking the Claimant’s situation into account.
- 16.7 In January 2021 the Claimant took some time off due to mental health issues. The precise dates are unclear but there was no evidence that the Respondent was critical of him at that time. The Claimant’s hours changed before his return due to operational requirements. I accepted Ms Delahunty’s evidence in her statement that there was some difficulty with the service caused by the Claimant’s absence and so she held a short meeting with him and Mr Jones on 8 February 2021.
- 16.8 There were notes produced of this meeting which were unchallenged. This note was of some importance given it appears in the chronology right at the start of the period of the Claimant’s complaints. The Claimant’s personal problems were acknowledged but business needs were stressed. It is apparent from this note that Mr Jones and Ms Delahunty felt that the Claimant’s working standards had slipped in recent times. They wanted to help him to “get back on track and put some structure in his working day”. They wanted him to be more work focussed whilst at work. It was noted that cookies had been burnt and sausages were of a poor standard. The notes do not suggest that the Claimant objected to these criticisms.
- 16.9 The Claimant was off work ill between 4 March and 14 March 2021, returning on 15 March 2021.

- 16.10 A new breakfast regime was adopted during that period of illness. Mr Jones sat down with the Claimant on his return with another member of staff and explained it to him, which included explaining cooking times.
- 16.11 The Claimant complained that Mr Jones began to be increasingly critical, particularly after this period of illness.
- 16.12 Mr Jones acknowledged in evidence that he could be direct when he was unhappy with a chef's performance. Mr Jones had acknowledged this also during an interview into the Claimant's grievance.
- 16.13 The Claimant in oral evidence said that he had raised with Ms Delahunty that Mr Jones was speaking to him in a way he thought undesirable. Ms Delahunty had no recollection of this conversation. I concluded that something was said by the Claimant, but it was given no particular emphasis and it was not in the nature of a grievance.
- 16.14 The Claimant has made a number of specific complaints about individual incidents. These were largely undated and with limited context in evidence. There is however some agreement between the parties that issues did arise during the Claimant's work in January, February and March.
- 16.15 On one date Mr Jones told everyone in the kitchen when things were not running smoothly, "come on, let's pick it up". I accepted that Mr Jones thought that the Claimant seemed disheartened by this and so told him specifically that it was not personal to him.
- 16.16 One potentially concerning feature of the evidence consisted of a WhatsApp exchange between the Claimant and the witness Ms Pennell which the Claimant introduced into evidence. Ms Pennell was reluctant to criticise Mr Jones when being cross-examined but text exchanges between her and the Claimant seemed to express a different view. Messages which she acknowledged had been sent by her (but which she could not recall the context for) included statements that:
- "He's a moody git he's made me feel really down. He's a big bully"
 - "OK thanks. It is bullying he gets a kick out of it. I'm glad Alan's off"
- 16.17 I note that the context for these exchanges was unclear after oral evidence as they were not explored by either party.
- 16.18 There were a number of other WhatsApp exchanges in the bundle which the Claimant suggested were between him and Ms Pennell but which the Respondent denied were likely to have come from her. The difficulty was that they were undated and there were no names. On re-reading the ET1, I noted

that the Claimant said he had “messages from members of the team whom I communicated with outside work” (my emphasis). It seemed to me that this was consistent with several different sources for the WhatsApp messages within the bundle, not only Ms Pennell. I was not prepared to attribute the other WhatsApp messages to Ms Pennell in absence of the evidence of the provenance of the disclosed messages.

- 16.19 It was not disputed that the Claimant had burnt a tray of cookies. This appears to have been in January or early February as the incident is mentioned in the 8 February meeting note. Mr Jones was annoyed that the cooking instructions had not been followed and said something to the effect that, “Do you realise how much money was wasted.” I did not hear evidence that Mr Jones made a big deal out of this mistake or suggested it was a disciplinary matter or similar. The Claimant’s main concern was to contrast the mistake with a situation with another employee who had dropped a large dish of lasagne some weeks earlier where the issue was said to be laughed off. Mr Jones acknowledged he did not criticise the other employee but noted that such was a rare mistake by the other employee. From the 8 February note I concluded that this was a minor criticism by Mr Jones. The reference to money being wasted will have come across as irritation.
- 16.20 On one undated occasion Mr Jones pulled the Claimant up on his cooking sausages. Again, this is likely to have been before 8 February. Mr Jones thought the Claimant was sending sausages out over-cooked. The Claimant disagreed saying that he thought the customers preferred sausages cooked to that degree. I concluded that whilst the Claimant felt hurt by this, it was a legitimate management intervention. The Head Chef was entitled to have his own view on the extent to which sausages should be cooked/browned. The issue was not presented as a serious matter by management on 8 February and the Claimant did not complain at that time.
- 16.21 The Claimant complained of an incident where he felt that Mr Jones was staring at him. The context was somewhat vague. Mr Jones explained in evidence that he had a lot of thinking to do when running the kitchen and it was not unusual for him to lean against a counter whilst he thought matters through or planned his day. When this issue was explored under cross-examination, the Claimant acknowledged that he walked through a kitchen door and Mr Jones was already standing in position looking his way. The Claimant did not say anything to Mr Jones at the time. I was unable to form a

conclusion that Mr Jones was doing anything deliberately to create upset. I found that on the evidence whilst the Claimant felt uncomfortable on this occasion, there was nothing objectively aggressive or malign in Mr Jones' behaviour.

- 16.22 A further complaint by the Claimant was that Mr Jones had asked him on one occasion to spend less time talking about horses and to focus more on his work. Mr Jones in evidence stated that he had no difficulty in principle with staff talking about outside interests but felt that the Claimant was on this occasion talking rather than working. I accepted that Mr Jones had told the Claimant off. His motivation was to get the Claimant to focus on his work.
- 16.23 The Claimant was asked to do pot-washing duties on 6 April 2021, as corroborated in his grievance email, for a period of a few hours. I accepted this request was made because Mr Jones interpreted that the Claimant was struggling with other duties. I also accepted other chefs were also required to wash pots from time to time.
- 16.24 The Claimant said in evidence that he did not accept that his standards had declined following his initial period of illness. I concluded that the Claimant's previously good standard of work had indeed slipped during his period of personal upheaval, and he was making mistakes and was less focussed. That is not a moral criticism of the Claimant and is a common occurrence in many workplaces with employees who have external pressures and distractions. I found that this led Mr Jones to pick the Claimant up on mistakes and lack of concentration. The 8 February note corroborates that this was a genuine concern.
- 16.25 More aligned with the Claimant's case, I concluded that Mr Jones' initially sympathetic attitude towards the Claimant became more robust because of persistent lack of focus. Mr Jones was more direct with the Claimant as he perceived standards slipping in a kitchen that was becoming busier as more Bet365 employees were coming into the office.
- 16.26 On 12 April 2021 the Claimant submitted a "sick note" running to 19 April 2021.
- 16.27 On 16 April 2021 the Claimant raised a formal grievance by email. He noted the upheaval, stress, and anxiety he had suffered at home.
- 16.28 A further Med 3 was submitted on 19 April 2021 running to 25 April 2021.
- 16.29 On 20 April 2021 the Claimant sent a resignation email [48]. The Claimant had not waited until the Respondent dealt with his grievance. I concluded that

the Claimant had arranged an alternative job to move to by this time as exposed by the Respondent's counsel in cross-examination.

16.30 The Respondent on the same date as the resignation sent an email wanting to discuss with him the matters raised.

16.31 A grievance hearing was arranged, but the Claimant did not attend. He was of course entitled not to do so. The Respondent carried out an investigation into the Claimant's complaints interviewing various members of staff, whose records of interview were within the bundle. The Respondent formally replied to the grievance on 12 May 2021. The grievance decision acknowledged that Mr Jones could be short with staff when the kitchen was not cohesive. The letter acknowledged that Mr Jones could have explained a change of the Claimant's hours better, but I note that this did not form part of the Claimant's complaint to the tribunal during the hearing.

16.32 The Claimant appealed the rejection of most of his grievances by email dated 17 May 2021. A grievance appeal took place on 4 June 2021 and the Claimant did attend on this occasion. The appeal was rejected on 16 June 2021.

Analysis and conclusions

17. The Claimant's case is that the Respondent's conduct, in particular that of Mr Jones, was intolerable and that he could not continue to work there for the sake of his health.

18. The Respondent's case was that:

- a. There was no breach of the term of implied trust and confidence
- b. The Claimant did not in any event leave because of the alleged breach.

19. In short, the Respondent submitted that Mr Jones' conduct was a reasonable way for a head chef to manage an unfocussed chef under his charge. It was emphasised that even on the Claimant's case, Mr Jones was highly supportive to the Claimant when he was going through his personal problems and so it was improbable that the Claimant was being singled out unfairly in the kitchen.

20. The Claimant responded in both evidence and submissions that Mr Jones was highly supportive outside work but not supportive inside of work.

21. My view was that there were 6 significant features of the case that assisted with analysis within the legal framework:
- a. The evidence is clear that the Claimant was happy in his work up to late January/early February 2021 and felt supported to that time.
 - b. This was during a period of great stress in the Claimant's personal life which was impacting his health regardless of work.
 - c. The Respondent drew a connection between the Claimant's health and deteriorating standards of work in the meeting on 8 February 2021.
 - d. Complaints made by the Claimant in the tribunal against Mr Jones were non-specific in terms of dates and times and vague in terms of detail.
 - e. The Respondent and Mr Jones had legitimate concerns about the Claimant's application and focus to his work after his return from illness in January 2021.
 - f. The period in which the complaints featured was a period of about 9 to 10 weeks maximum covering February, March and early April 2021. The Claimant was off work for 1 ½ of those weeks. Thus, the period complained about was relatively short with the Claimant not returning to work between sickness beginning 6 April and his resignation.
 - g. There was a change in the breakfast regime during that period and so the Claimant with other employees had to adjust their previous work.
22. A point emphasised by Respondent's counsel in submissions was that in the grievance appeal hearing and repeated in his oral evidence, the Claimant stated that Mr Jones should have treated everyone else "like he was treating me". The Claimant agreed that had Mr Jones done so it would have been fair. Counsel's observation was that this meant it was not in substance the Claimant's case that Mr Jones was tyrannical to the Claimant but rather that he thought the increased direction and criticism provided to him specifically was unmerited.
23. The Respondent submits that the WhatsApp messages from Ms Pennell do not flesh out the Claimant's allegations, which are essentially that his manager was too harsh on him individually. I agree with this. The WhatsApp messages do not fit with the Claimant's case that he was being singled out. If anything, Ms Pennell was complaining in the initial message that she herself was being bullied. Her evidence relating to the WhatsApp messages was only superficially explored by the Claimant in cross-examination. I concluded that these messages were generalised griping. It is

consistent with Mr Jones' management style at times being firmer and more direct to staff than he and the Respondent's witnesses admitted to, but I cannot infer from the messages that Mr Jones' management style was directed capriciously towards the Claimant.

24. In terms of overall management style, I recognised that Mr Jones was managing numerous chefs in an increasingly busy kitchen coming out of a hybrid working situation for bet365 staff. Whilst conduct which can seriously undermine or destroy trust and confidence in an employment relationship need not be loud or openly abusive, I thought it significant that there were no complaints of swearing, shouting or name-calling. There were no threats of disciplinary action against the Claimant by Mr Jones. My conclusion was that Mr Jones was at times exasperated with what he perceived to be a lack of focus by the Claimant and hence was direct with him. This exasperation may have been revealed by some elements of body language but there was not enough in the facts found to allow a conclusion that the Claimant had to work in a regularly intimidating or hostile environment.
25. Overall, the working scenario does not come close on an objective analysis to destruction of the relationship of trust and confidence constituting breach of the implied term. The facts and evidence instead provide a picture of a head chef, who has done his best to support actively the Claimant through a difficult period, then managing reduced performance and mistakes. Whilst I have accepted that Mr Jones was increasingly firm and direct with the Claimant, the evidence does not allow me to conclude that Mr Jones had overstepped the line either repeatedly or to such a degree for his management style to objectively destroy the trust and confidence in the employment relationship over what was only a 9-week period. I acknowledge that the Claimant was unhappy at work and did not feel subjectively that the stricter management he received was merited, but I considered it was not the tribunal's job to second guess day to day management of specific problems in a busy kitchen but rather to see whether things have gone seriously wrong in the employment relationship.
26. Though in the Claimant's evidence there were some suggestions of a conspiracy within the kitchen to drive him out because others wanted his hours, I found no evidence to that effect. The point appeared in a somewhat vague assertion.

27. While the Claimant's case fails on breach of contract, I do deal with the issue of causation. The Claimant's grievance was on 17 April 2021. He ended the grievance email by saying that if further details were required to contact him. He resigned only 3 days later on 20 April. The Claimant was extremely uncomfortable about being cross-examined over the details of his leaving. I concluded that he had applied for alternative work sometime in earlier April. I cannot make a finding as to when he may have been interviewed by the new employer. My conclusion is that while the Claimant did resign in part because he had a new job, the predominant cause was that he was unhappy at work. Had I been satisfied that the Respondent's conduct amounted to a repudiatory breach I would have been found causation satisfied.

28. Overall, however, the claim must be dismissed.

Employment Judge McCluggage

21/05/2022