



EMPLOYMENT TRIBUNALS

Claimant: Mr P Hobson
Respondent: Energas Ltd
Heard by CVP 24 May 2022

Before: Employment Judge Rogerson
Members:

Representation

Claimant: in person
Respondent: Mr B Frew (counsel)

RESERVED JUDGMENT

The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Applicable Law and the Issues

1. The claimant makes a complaint of constructive unfair dismissal following his resignation on 2 August 2021 with notice ending on 27 August 2021. The respondent disputes the dismissal and contends the claimant resigned because he was unhappy performing parts of his role and only wanted to drive and drop off deliveries. It was his choice to resign he was not constructively dismissed. In the alternative the respondent relies upon some other substantial reason justifying the dismissal relying on the role the claimant was employed to perform of "internal sales/stores and driver" which included sales and stores which the claimant was required to perform to meet the business needs including providing cover for absences. If the claim succeeds the respondent will seek a 100% reduction in any compensation awarded on the basis that the claimant's conduct contributed 100% to his constructive dismissal.
2. Before hearing any evidence, I explained to the claimant that he was required to prove he was 'dismissed' to succeed in his complaint of constructive unfair dismissal. Dismissal in these circumstances is defined

by section 95(1)(c) of the Employment Rights Act 1996(ERA 1996) which provides that an employee is to be treated as dismissed if:

“the employee terminates the contract which 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”.

3. The employer must be guilty of conduct which is a significant breach going to the root of the contract of employment(repudiatory breach) or which shows that the employer no longer intends to be bound by one or more of essential terms, then the employee is entitled to treat himself as discharged from any further performance. If he does then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed” (Western Excavating (ECC) Ltd-v- Sharp 1978 ICR 221 CA).
4. The claimant relies upon the conduct of the manager, Mr Mike Kassim whom he alleges had bullied and harassed him from 2020 on the occasions identified by the claimant in his witness statement because he resented the fact that the claimant had been furloughed from April 2020- July 2020.
5. The implied term of mutual trust and confidence requires that neither party will without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Malik-v- Bank of Credit and Commerce International SA(in compulsory liquidation)1997 ICR 606 HL).
6. The Tribunal’s role is to objectively view the conduct complained about to decide whether the implied term was engaged and if it was whether it was breached by the employer. To do that I explained to the claimant that on the evidence provided by both parties I will decide the following:
 - 6.1 What happened in relation to each alleged act/ommission?
 - 6.2 Whether the manager have reasonable and proper cause for that act/omission? (It is for the claimant to prove the absence of reasonable and proper cause).
 - 6.3 If there was no reasonable and proper cause for that conduct, was it calculated or likely to destroy or seriously damage trust and confidence?
 - 6.4 If so, did the claimant affirm the breach by continuing to work after the breach and delaying his resignation losing the right to claim constructive dismissal?
 - 6.5 Was there a last straw that revived any earlier breaches of contract? Did the claimant resign in response to the breach of contract (was the employer’s repudiatory conduct an effective cause of the resignation)?
 - 6.6 If there was a constructive dismissal was the reason for the dismissal ‘some other substantial reason of the kind to justify the dismissal’ which was the potentially fair reason that is advanced by the respondent of?
 - 6.7 Was the dismissal unfair? If it was unfair has the claimant to any extent contributed to his dismissal by his conduct? Has the claimant complied with the ACAS disciplinary and grievance procedures? If not is it appropriate to make any deduction of up to 25% from any award of compensation?

7. Guidance on 'last straw' cases has been provided in the case of *Omilaju -v- Waltham Forest London Borough Council* 2005 ICR 481 CA. The Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct that is perfectly reasonable and justifiable satisfies the last straw test.
8. More recently in *Kaur -v- Leeds Teaching Hospitals NHS Trust* 2019 ICR 1 CA the Court of Appeal offered guidance to tribunal's by listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:
 - (i) what was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?
 - (ii) Has he or she affirmed the contract since that act?
 - (iii) If not, was that act (or omission) by itself a repudiates the breach of contract?
 - (iv) If not, was it nevertheless a part of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiates breach of trust and confidence?
 - (v) Did the employee resign in response (or partly in response) to that breach?

Assessment of credibility

- 2 I found that all the witnesses that gave evidence did so in a direct straightforward way and answered the questions truthfully. Extra time was allowed for the claimant to work from his notes to formulate questions for cross examination and assistance was provided to identify the areas of disagreement (as well as they could be) because the claimant often made long statements instead of asking questions. Where there were disputes of fact, I resolved those disputes by attaching weight to the unchallenged contemporaneous documentary evidence. Overall, I found the claimant's recollection of events was less reliable and less credible than the respondent's witness evidence.
- 3 What became clear at this hearing was that from 2020, the claimant did not have a good relationship with Mr Kassim and did not like his hands on style of management on the occasions he managed the claimant or became involved in any issue relating to the claimant. Although the claimant describes having a very positive relationship and thought he was well regarded by with his manager Mr M Randerson and thought any negative

view was because of Mr Kassim's influence that view was not supported by the evidence. Mr Randerson had concerns about the claimant's performance/attitude and viewed the claimant as someone who was selfish and troublesome when he did not get his own way, even though he may not have expressed that view directly to the claimant.

- 4 I heard evidence from the claimant and then for the respondent from Mrs Caroline Moore (Support Lead) and from Mr Michael Kassim (Facility and Distribution Manager).
- 5 I saw documents from an agreed bundle of documents to which the claimant added a letter from his GP dated 10th of May 2022. References to page numbers in these reasons are to the page numbers in the bundle.

Findings of fact

- 6 The respondent is a commercial producer and supplier of industrial gases and related services to industry clients. The claimant commenced employment with the respondent on 26 May 2014 in the role of Internal sales/Stores/Driver until his termination by resignation on 2 August 2021 with notice ending on 27 August 2021.
- 7 The claimant was based at the respondent's Sheffield depot which was divided into two teams: selling and supplying gas and engineering products. The claimant worked on the engineering product side in a small team of two sales/stores/drivers (Nick being the other employee) who both reported to Michael Randerson (Equipment Branch Manager). Generally, the way the team worked was that because Nick was better on the computer, he would do the internal sales and the claimant would do most of the driving delivering the products to customers. This suited their preferences but could not always be accommodated by the business if absences had to be covered/business need required different parts of the role to be performed. The respondent's practice had always been to recruit agency drivers to cover for absences in the team because it was easier to recruit agency workers to cover driving duties rather than the store and sales area which would have required more training and more instruction and was not cost effective. Mrs Moore explained it had always been the custom and practice of the business to cover absences at the Sheffield depot in this way and the claimant had always known his role was a multiple role and that in a small team flexibility was required depending on the needs of business.
- 8 Although the claimant preferred to drive, and that preference was accommodated when it was possible the claimant also knew in his 7 years of employment when and why agency drivers were used. His job description summary at page 38 identifies that the claimant's role was wider than driving he was required to:

“receive, store, and sell engineering and welding equipment. Stock shelves and arrange merchandise displays to attract customers. Periodically take physical count of stock. Drive company vehicle over establish roots all within an established territory to deliver goods”.

A large number of key responsibilities were identified in the job description including driving which was only a part of the role the claimant was required to perform listed as:

“drive company vehicle to deliver goods as required”.

9. The claimant did not like working in the warehouse or in the yard and had made his feelings known to Mr Randerson. On 20 March 2019, Mr Anderson sent an email to Miss Moore reporting that the claimant had threatened to leave because Nick was due to have some holiday and the claimant knew he would have to cover in the warehouse and would not be sent out driving. The relevant parts of the email at page 44 in the bundle state as follows:

“You may have had Paul Hobson on to you moaning about having to work in the warehouse and yard and asking how much notice he needs to give.

*He grumbled to me last week asking why he had been brought inside when someone else was off. **I explained that everybody was having to do other duties, but he has blinkers on and only sees it from a selfish viewpoint.***

I said we had very little option but to utilise him where we could plus give him training on using the AS400 and that it could be inside for the next six weeks as Nick goes on holiday at the end of April.

He finished the conversation saying he was fed up of it and didn't want to work inside so he would look for another job. Sorry to say he wouldn't be a great loss just more problems for us training somebody else up.

My concern is that to cause maximum disruption he chooses to be off (carpal tunnel makes a sudden re-appearance) or hands in his notice to coincide with Nick's leave”

- 9 As Mr Frew pointed out to the claimant, this had been the claimant's position before any of the events he complains about involving Mr Kassim. At this hearing, the claimant suggested that the reason he was reluctant to work in the yard was because of the dust in the yard which affected his COPD. It doesn't appear that this was the concern he reported to Mr Randerson at the time to explain why he preferred to drive. There was no reason for the claimant not to tell his manager given his view that he had a good working relationship with him. This email clearly shows that based on the information given to Mr Randerson he considered the claimant's refusal was for selfish reasons only and he was not considering the team. He also confirms his view that if the claimant carried out his threat and left, he would not be a loss to the business.
- 10 This email was as Mr Frew points out sent at a time before any of the claimant's complaints about Mr Kassim's alleged conduct in 2020 and supported the closing submission made by Mr Frew that the real issue for the claimant was that he only wanted to drive and he did not want to perform the other parts of his role that he knew he was required to.
- 11 Due to the outbreak of the Covid 19 pandemic, the claimant was furloughed from 29 April 2020 until 12 July 2020. The respondent took the decision to furlough the claimant following government guidance to shield the claimant because of his medical conditions of COPD and diabetes. Whilst it is accepted that the claimant never provided any medical evidence of his COPD or a shielding letter the respondent took the decision to furlough without requiring him to provide any evidence.
- 12 The claimant accepts he had a good relationship with Mr Kassim and that they enjoyed having banter with each other, but asserts that their relationship changed after he was furloughed. He relies upon an occasion in March 2020, when Mr Randerson had initially told the claimant to go home to shield and then changed his mind after speaking to Mr Kassim. The claimant doesn't know what was said but complains this was an unnecessary intervention by Mr Kassim.
- 13 Mr Kassim recalls a discussion with Mr Randerson following a morning briefing after which it had appeared that he may have misinterpreted the guidance given in the briefing by instructing the claimant to go home. Mr Kassim had intervened and cleared this up with Mr Randerson who revoked his instruction to ensure consistency because no one (including the claimant) was furloughed until 29th of April 2020.
- 14 Mrs Moore agreed that as at March 2020, things were changing on a daily basis in terms of the guidance being provided about what the respondent should do with staff because of COVID 19 which was the reason why these regular briefings occurred to ensure consistency across the business.
- 15 In evidence the claimant confirmed that at that time he wanted to be at work and did not want to be sent home. It was difficult then to understand why the claimant views this intervention as a breach of trust and confidence. He seems to be complaining that because Mr Kassim was not his manager, he should not be intervening in any decisions made by his manager whether it was correct or incorrect. He did not challenge the evidence given about why Mr Kassim 'intervened' or dispute that Mr Randerson had got the wrong end of the stick. It was reasonable and proper for Mr Kassim to correct any

misunderstanding by another manager following a company briefing to ensure all managers were acting consistently, rather than ignoring it and saying nothing.

- 16 The next complaint raised by the claimant is about Mr Kassim making an enquiry about furlough payments which the claimant alleges showed he had a vendetta against the claimant because he resented the fact he had been furloughed. The email messages show Mr Kassim made an enquiry on the claimant's behalf to seek guidance on the payments that would be made. I accepted Mr Kassim's evidence that he would not have made that enquiry if the claimant had not asked him the question and from my reading of the emails there was nothing to suggest any resentment in the way the enquiry was made. It does show that Mr Kassim took any concern the claimant raised with him seriously and that he responded in a reasonable and proper way. The claimant suggested that this enquiry shows that Mr Kassim was unhappy, the claimant had been furloughed and resented the claimant for that reason. Mr Kassim denied the allegation and very honestly admitted that at times he wished he had Covid (without having any serious symptoms) just because it would have given him some time off work. He had no issue with the claimant being on furlough because that was the right thing to do for him and for the company. The claimant did not agree that it was for his benefit at all suggesting it was only for the company's benefit. He asked Mrs Moore to agree it was for the company's benefit only because of the reduced workload. She disagreed and confirmed the furlough scheme benefited both employees and the employer during this difficult time accepting that the business was affected by reduced workload because of the pandemic but that it had a duty to protect its workforce. None of this evidence supported the claimant's case.
- 17 The claimant also relies upon a conversation he had with Mr Kassim before he went on furlough leave (April 2020) in which he alleges he was told he would not be able to leave his house and undergo the same activities that he would usually do (driving and walking). The claimant alleges Mr Kassim accused him of running "rings around his manager" and that he would not let the claimant make him look like a "fucking idiot". The claimant alleges that Mr Kassim told him that he would sit outside the claimant's house during the furlough period if needed to make sure the claimant did not go outside. The claimant responded by challenging this comment saying "will you" to which Mr Kassim backed down and said "no I won't".
- 18 Mr Kassim's evidence was that he had given the claimant the guidance he had been told to provide him with that was issued by the government and had not threatened the claimant. Although the claimant challenged that evidence, he agreed with Mr Frew that on his own account, he clearly had not felt threatened at the time and had successfully challenged the comment. The claimant agreed he did not feel threatened by Mr Kassim and often engaged in 'banter' which involved swearing as part of the industrial language used by all in the workplace without it causing offence. The claimant did not resign in response to that conduct which he did not take seriously at the time which was confirmed by his reaction.
- 19 After returning to work in July 2020 the claimant does not make any complaint about Mr Kassim's conduct at all until October 2020, when he was absent from work for a month due to catching COVID. During his

absence he complains that Mr Kassim tried to contact him and had left 3 phone messages for him because he had been unable to speak to him that day. Mr Kassim explained the reason for the repeated calls were because they were welfare checks on the claimant which the company had agreed managers were required to do. Managers were expected to complete a proforma of questions to ensure contact was made with employees during a Covid absence to offer any assistance required for example with shopping and carry out a welfare check. This evidence was consistent with the proforma documentation I saw in the bundle with questions managers were expected to ask employees. It was reasonable and proper for Mr Kassim to make the call and follow-up calls when he had been unable to speak to the claimant.

- 20 The claimant describes an occasion (date unspecified) when Mr Kassim was managing his work. Mr Kassim asked the claimant why he had failed to complete the scheduled deliveries the previous day which had been urgent and had resulted in the customer phoning the depot a number of times to ask where his delivery was. The claimant alleges Mr Kassim told him it was “fucking shit” and he was going to put the claimant’s workload in order to ensure the deliveries were completed as scheduled. The claimant states (paragraph 10 of his witness statement):

“we argued and he stated that he wouldn’t let me make him out to be a fucking idiot. He stated that the van I drive would have a tracker fitted so that he could monitor my location. I rang HR and told Caroline that I could no longer work like this and I would quit as a result of my treatment from Mr Kassim. Caroline said that she would talk to Mel Stevenson I told Mike Randerson of Mr Kassim’s words upon his return from leave. Mike Randerson stated that all vans were having trackers fitted not just mine”.

- 21 Mr Kassim confirmed that he had decided to manage the workload to ensure the deliveries were completed and may have referred to the tracker being fitted which would have enabled the respondent to see the progress of deliveries and be able to explain any delays to customers in real time. He knew all delivery vans would have trackers fitted and would not have singled the claimant out because it was not his decision to fit trackers it was a company decision.
- 22 Mrs Moore recalled a telephone call with the claimant complaining about Mr Kassim’s management of him. She advised the claimant to raise a grievance if he had any specific concerns so they could be investigated. She confirmed that Mr Randerson had complained to her about the claimant being unmanageable and she had seen the email he sent in March 2019. All the management team really struggled with the claimant’s insistence that he should only need to carry out one part of his role. She explained that the site in Sheffield is a relatively small site and the company have always advertised roles as multifunctional roles to ensure that people could and would provide cover for colleagues during leave and absences depending on business needs. There were only two drivers in Sheffield including the claimant so it was the case that he was often driving but on other occasions he was brought inside to deal with good inwards, sort out the depot, carry out sales in the warehouse/yard. There is only one equipment van in Sheffield. There are two people who work in the role of internal sales/stores/driver, but the other person (Nick) works permanently in the

depot on the computer system which the claimant could not operate. Agency drivers would be recruited to cover absences because it was easier to recruit agency drivers on a as and when required basis so they could be released easily when the business need had been met.

- 23 Mrs Moore confirmed that in March 2020, Mel Stevenson (Branch Manager) had confirmed that an agency driver should be brought in just in case there was a panic buy of equipment and driver cover was needed. It was clear that it was the decision of the senior management team to use agency drivers and that it was not Mr Kassim's decision. It proved to be the right decision to make when the claimant was furloughed in April 2020 for 4 months and as Mrs Moore. She also confirmed that guidance had been issued to all managers on 7 April 2020, on the amount and type of contact to make with furloughed staff and staff absent with COVID which all managers were expected to follow.
- 24 Mrs Moore also recalled a discussion at the site in 2021 about the summer holiday period coming up and how staff absences were to be covered at the depot. The senior management team decided to engage an agency driver over the summer months for 2-3 months to cover holidays including the claimant's holidays. The contemporaneous emails confirm the decision was made for those reasons.
- 25 The claimant had spoken to the agency worker that had been recruited (Russell) who informed the claimant that he would be undertaking the claimant's driving duties for 2-3 months. The claimant went to see Mr Randerson and told him he was going to a dental appointment and would not be coming back to work because he felt it was a 'constructive dismissal'. The claimant phoned Mel Stevenson (Branch Manager) to state that he would be leaving his role. He says she told him to go home calm down and return the next day and confirmed that he was a valued worker and that the agency worker had been engaged to provide cover for the holiday period.
- 26 The claimant returned to work and continued to work until his resignation, without raise any grievance. He then refers to the last straw incident which was on an occasion (date unspecified) when he was speaking to Russ. At that time a courier had dropped two boxes of products at the depot which Mr Kassim had seen. The claimant then opened the boxes put away the stock and walked back to see Mr Anderson who was laughing at him. He asked Mr Randerson him why he was laughing at him to which he replied: "it's you it's you it's always you". The claimant asked him what he meant. Mr Randerson explained that Mr Kassim had told him that the claimant was chatting to Russ instead of doing his work. The claimant wasn't happy about this and confronted Mr Kassim asking him why he was 'snitching on him' to Mr Randerson. Mr Kassim could not recall the discussion.
- 27 On another occasion (date unspecified) the claimant accepts that he had not put some empty gas cylinders away. Mr Kassim 'confronted' him and told him it was a health and safety risk and that on that occasion he had put the cylinders away for the claimant but requested that in future this was done correctly to prevent an accident.
- 28 In relation to the day of the claimant's resignation this is referred to in paragraph 20 of the claimant's witness statement but he does not provide any context to what happened on that day to cause him to resign. His

statement simply says *“one day I pulled Mr Randerson aside to say I was going to hand my notice in. I wrote my notice there and then”*.

29 The claimant’s resignation letter was handwritten written on 2 August 2021 and simply says that he was resigning with notice and was banking his manager the opportunity that he enjoyed his time but that his job had become “untenable” without any explanation.

30 On the same date Mr Randerson wrote an email to Mrs Stevenson and Mrs Moore which states as follows:

“Paul Hobson has just handed in his letter of resignation (attached) which I have accepted.

I have spoken with him and he says because the agency driver is here for another 2 to 3 months he cannot stand being in the warehouse and yard for all that time.

He only wants to drive and understands that we need someone to do warehouse work, covered the gas yard when needed and serve at the sales counter when busy or as holiday cover. He feels that is not him, so prefers to go and look for work as a driver only.

I said I would be sorry to see him go but the requirement now is for a person to multitask because we don’t have extra bodies in branch.

Paul will be here for the next two weeks then he is on holiday for two weeks.

I will sound out the agency driver but I don’t think he wants full-time commitment will let you know”

31 That document was closest in time to the claimant’s resignation and confirms the reason the claimant gave to his manager (with whom he had a good relationship) was likely to be his real reason for resigning which was his preference was driving and that he would look for a role that just involved driving.

32 Mrs Moore considered the resignation may have been a knee jerk resignation and was something the claimant threatened to do if he was unhappy but offered the claimant an exit interview to air any grievances he may have had. The claimant did not take up the offer and did not raise any written grievance before or after his dismissal. His previous experience of raising matters was positive and he could not explain why he had not pursued a grievance before resigning if he had genuine concerns about his treatment at work. If he had they would have been investigated and he had no reason to think that a proper grievance process would not have been followed. The only explanation the claimant gave was that he did not want to cause any conflict, but at this point he had decided to resign and had until the end of his notice. He could not explain why he did not raise a grievance in that period either. I find the claimant has unreasonably failed to comply with the respondent’s grievance procedure by failing to raise a grievance in breach of the ACAS Grievance and Disciplinary Code(2015).

Conclusions

- 33 Based on the findings of fact made I conclude that the claimant resigned voluntarily from his employment out of personal choice because he only wanted to be a driver and not perform the other parts of his role (internal sales/stores). There was no repudiatory breach of contract on the part of the employer which would have entitled him to treat himself as constructively dismissed.
- 34 While I could see that there was (and is) a clear personality clash between the claimant and Mr Kassim that was attributable to the fact that the claimant did not like Mr Kassim managing him or being involved in any aspect of his work. It was not for the claimant to decide who would manage him or how his work would be managed. It was perfectly reasonable for the respondent to decide its managers should manage employees in a way that ensured the roles were performing effectively, efficiently, and safely in order to meet the business needs. Managers were responsible for ensuring management issues were dealt with individually and collectively whether it was by answering an employee's queries (furlough payments), carrying out welfare checks(covid welfare calls), organising workload and highlighting any work related concerns that come to light, whether work has been completed or completed in the correct way (deliveries not made/gas cylinders not put away/ chatting instead of working).
- 35 Although Mr Kassim chose to deal with performance concerns informally with the claimant either by speaking to him directly or with his manager, the claimant unreasonably formed the view he was being 'picked on' or 'snitched on'. In doing so the claimant has failed to recognise that on each occasion he complains about, Mr Kassim had observed or identified a performance concern. He was proactively managing the claimant in a reasonable and proper way. While it was clear that the claimant disliked his management style that was not a breach of the implied term of mutual trust and confidence. The claimant cannot explain why he never raised a grievance about any alleged inappropriate behaviour which he was invited to do so that any concerns raised could be investigated. The inference that can be made is that the claimant did not raise a grievance because he knew that he was being properly managed or realised that if he did raise a grievance he might reveal the shortcomings in his performance/conduct at work Mr Kassim had identified to other managers in the respondent business.
- 36 In any event whatever the reason was the claimant has not proved he was dismissed in accordance with section 95(1)(c) ERA 1996 and his complaint of unfair dismissal is not well founded fails and is dismissed.

Employment Judge Rogerson

Date 27 May 2022