



EMPLOYMENT TRIBUNALS

Claimant: Mr Jarvis

Respondent: Serco Ltd

By CVP

On: 04 April 2022

Before: Employment Judge Martin

Representation

Claimant: In person

Respondent: Mr Moss – Employee Relations

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. The Claimant presented a claim on 3 September 2020, alleging that he had been constructively unfairly dismissed by the Respondent. The Respondent defended the claim by a response dated 25 March 2021. The Respondent denied that there was any breach of contract entitling the Claimant to resign and claim unfair dismissal.
2. I heard evidence from the Claimant and from Ms Michelle Collins (Assistant Director at HMP Thameside and responsible for Governance and Contract Assurance at the Prison and Serco's contract with Ministry of Justice) who heard his grievance. I had before me a bundle of documents (including an additional section provided on the day) comprising 263 pages. Both witnesses provided written witness statements.

The issues

1. The issues that the Tribunal had to determine were:
 - 1.1 Whether the Respondent committed fundamental breach of the Claimant's contract of employment
 - 1.2 Whether the Claimant resigned in response to that breach
 - 1.3 What the last straw was that triggered the Claimant's resignation
 - 1.4 Whether the Claimant delayed too long before resigning, thus affirming the contract, and losing the right to claim constructive dismissal.

The Law

2. The law as relevant to the issues:
 - 2.1 s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or 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.
 - 2.2 **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA**, held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of 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'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or 'repudiatory'.
 - 2.3 **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347** held that to constitute a breach it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
 - 2.4 **Lewis v Motorworld Garages Ltd [1985] IRLR 465** held that significant breaches by an employer of express terms of an employment contract, although waived by the employee, can still form part of a series of actions which cumulatively breach the implied obligation of trust and confidence.
 - 2.5 The Respondent referred to **Nelson v BBC [1977] IRLR 148** in which the Court of Appeal overturned the Tribunal's decision that a contractual term allowing the employer to require an employee to work anywhere in the business was limited by an implied term that he would be only required to work in the same area as he was employed originally. The Court of Appeal held that if the wording of the contract was intentionally wide enough to allow the BBC to employ him anywhere, this should not be limited.

Findings of fact and conclusions

3. The Tribunal has come to the following finding of fact having heard the evidence and considered the documents referred to. These findings are made on the balance of probabilities. Not all evidence heard is recorded below. These findings are limited to those findings that are relevant to the issues and necessary to explain the decision. All evidence was however heard and considered.
4. The Respondent is described in the grounds of resistance as *“an international service company which provides business services for public sector organisations globally. The Respondent holds key contracts with UK national and local government involving it in important areas of public service, including health, education, transport, science and defence. As part of its activities, the Respondent manages prison services for the Ministry of Justice across the United Kingdom including at HMP Thameside where the Claimant worked”*.
5. The Claimant was employed by the Respondent from 26 October 2009 until 31 July 2020. From 15 May 2015 the Claimant had the role of Industries Manager. This was a role that liaised with local industries to prepare prisoners for work on their release.
6. There are two aspects to the Claimant’s claim on which he relies. The first concerns flexible working requests and the second concerns changes to his job and whether there should have been a benchmarking process before he started the new role.

Relevant policies and contractual documents

7. The Claimant’s contract of employment is widely drafted and states *“Your job title, grade, reporting line, business area and location are specified in the Schedule of Employment. The Company reserves the right to change your job title and reporting line where this is necessary and appropriate for the conduct of its business”* and *“The Company shall be entitled to require you to work in any other capacity reasonably within the scope of your abilities”*.
8. There are therefore broad contractual powers within the contract of employment with the only limitation being that any work allocated must be within the employee’s capabilities. This means the Respondent can lawfully request an employee to undertake any work within his or her capabilities without having to seek the consent of the employee. Of course, there is an implied term that any change would be dealt with reasonably. It is relevant to this case to note that there is no requirement that there is a benchmarking process undertaken before an employee can take up amended roles.
9. The Respondent has a flexible working policy. This policy sets out the circumstances in which flexible working can be applied for, the types of working arrangements it covers and states that an application can normally be made only once in 12-month period. There is a template form for applications which forms part of the policy which states that only one application can be made in a 12-month period. It does not contain the word *“normally”*.
10. The Respondent has a bullying and harassment policy. Within this policy are set out what is bullying and harassment and what is excluded by the policy. The policy states:

2.1 What Bullying is not

"The following do not constitute bullying:

- *Reasonable and essential discipline arising from good management of the performance of an employee at work;*
- *Actions taken which can be justified as regards the health and welfare of the employees;*
- *Legitimate management responses to crisis situations which require immediate action;*
- *Complaints relating to instructions issued by a manager, assignment of duties, terms and conditions of employment or other matters which are appropriate for referral under the normal grievance procedure".*

11. An example of bullying is setting someone up to fail.
12. The Respondent has a grievance policy. There were no complaints about the implementation of this policy, so I do not intend to address this.

The Claimant's employment

13. The Claimant's employment has seen many changes to his role and job description. This reflects the changing nature of the prison and what is required at any time. Over the years undertook many different roles.
14. Covid 19 had a large effect on the Respondent's operations. Staff were absent and there needed to be re-organisations to cope with the effects of the pandemic.
15. In August 2019 the Claimant had a period of sick leave for mental health issues. He discussed these issues in a return-to-work interview at which Ms Collins took notes.

Flexible working request

16. The Claimant made his first application for flexible working on 4 November 2019 in which he requested he worked three days per week. This was approved. The next day he amended the request, so he worked four days per week. This was approved. On 11 December 2019. The Claimant was informed this revised request had been accepted for a trial period commencing 6 January 2020 to be reviewed on 6 April 2020. The change to the Claimants terms and conditions of employment was confirmed to the Claimant by People Services on 17 February 2020.
17. Around the end of March 2020, the Claimant agreed to support the prison by covering Stores and 'Bag and Tag' in the absence of the existing manager on sick leave. The Claimant sent an email on 7 April 2020 (the day after his trial period expired) saying *"My flexible working agreement has come to the end of its 3-month trial period and whilst I would like it to continue I do not consider this to be in the best interest of the company in the current climate. if you are in agreement, I will revert back to the 5 day working week (from 30th March) as I have worked the previous two Mondays. Denise would need to inform the relevant departments to facilitate this. Please let me know your thoughts"*.
18. The Respondent accepted his change back to 5 days per week and this was approved and actioned on 7 May 2020 backdated to 2 April 2020. The form headed Pay and Hours Change and int the box for his job "*B6 Team Leader 1/*". There is another box for job banding which was left blank. The Claimant's pay change reflected they pay he received before he reduced his days to four days per week. In his evidence the Claimant told me that his intention was to revert to a work a five-day week to be for a temporary period only to help, and that after this he would simply return to a four-day week. This may have been his intention, but this was

not expressed to the Respondent. The Claimant recognised this during his evidence saying on more than one occasion that he had “*shot himself in the foot*” by suggesting working for five days in the way he had worded it. As far as the Respondent was concerned the Claimant was permanently working a five-day week from then on.

19. The policy says that normally only one application can be made in any 12-month period. This means that there could be exceptions to this rule. The application form which forms part of the policy refers to only one application being made in a 12-month period, without the word “*normally*”.
20. There were discussions between the Claimant and Mr Teesdale. During these discussions Mr Teesdale told the Claimant he would have to make another application for flexible working as his application for a five-day week had been agreed and was a permanent change. He said he would be happy to consider an application from the Claimant. The Claimant objected saying he could not make another application because the policy said only one could be made in a 12-month period. By policy he meant the application form wording and not the policy itself. It appears that Mr Teesdale did not fully explain to the Claimant that notwithstanding what the form said he would consider a further application. I asked the Claimant if he had referred to the actual policy and he told me that whilst he knew there were various policies, he did not check them even though he had access to them. As part of his role within the Respondent he was responsible for managing other staff, and had been for quite some time.
21. The second issue involved a move to new role following a reorganisation due for business needs. This role was a new role, and it was not known at that stage precisely what the new role would comprise. The Claimant sent an email on 26 May querying the new role:

*“Thanks for meeting with me yesterday.
I Just wanted to clarify a few points we very briefly discussed at this meeting. (sic)*

Changes to my job description, am I to expect to receive a formal letter explaining these changes or can you note down these changes and send these to me so I can digest these and raise any questions that I may have?”

22. Mr Teesdale replied the next day:

“Your job will be the same broad function that is has been and I will ensure you have an appraisal which will incorporate different priorities and changes which in truth are typical of our fast changing environment. These changing priorities impact us all and are reflective of our need to be responsive to the changing environment (The prison has changed in recent years and will continue to change due to the strategic reconfiguration for example). The Director and Deputy Director have defined a fresh management structure to enable the wider Thameside management team to focus and respond in flexible ways to enable more effective and efficient service delivery. In essence you will remain responsible for work parties and but you will also be responsible for activities monitoring, managing the 4 Bubble OSOs and working in partnership with the other Residential managers particularly at middle management level and the PA team. As I said in Mondays meeting we are keen to introduce improved ways of working including managers working collaboratively, being empowered to own functions and areas with greater partnership working more so than historical silo working. I emphasised that you will be an essential part of the Residential management team and that we will all be in a position of both helping and supporting each other with greater teamwork within managers of an equal rank – senior managers operating as a team and middle managers operating as a team”.

23. There then followed a series of meetings between the Claimant and Mr Teesdale. The record of these is found in notes the Claimant made shortly after the meeting. The first note is not dated but would appear to be between the 17 May 2020 when

Mr Teesdale sent his email to the Claimant and 8 June 2020 when the second meeting occurred. The note of the first meeting said:

“Just come out of a meeting with Mick where he explained to me that there were changes ahead and Andy would not be my line manager going forward and I would be reporting directly to him. There were also possible changes ahead that could incorporate Industries moving to a different directorate but emphasised that my position is safe and would not change”.

24. The note of the second meeting records:

“Just come out of a second meeting with Mick

Mick said there are changes ahead and Works parties are moving under the residential directorate.

I asked where that leaves me as I am the Industries Manager and non-operational.

Mick said now going to be 3 residential Assistant directors that I would report to but that he would remain my line manager; do I have any issues with this? I said I have no issues with him being my line manager but I am the Industries manager which is non-operational.

Mick said I will remain non operational but will be under the residential directorate and I would also be taking on the residential bubble admin team consisting of 4 staff members.

I asked Mick if I could have the job description for the new position. Mick said there was not one as he did not know too much about it other than it was mainly to do with purposeful activities and the collecting of registers from the house block.

I asked if the position had been evaluated via the success profile and he said it had not as he did not feel this was necessary.

I said to Mick that the position needs to be benchmarked as it is a new role. Mick said there was no need to as the role is a management position.

I said this is not right, what happens in a few months' time and you decide more employees and their duties should be added onto me am I expected to manage the entire prison just because I am in a

Mick then said he would reluctantly get the position benchmarked but I would need to be doing the role first as the role is developing and he is uncertain what the role in its entirety is at the moment.

I said to Mick that I feel I am being bullied into accepting the position that you have admitted you do not fully know what the role is and to take on more staff without any remuneration I find insulting.

I said to mick, You know I have been in this situation before when I stepped up to cover Kevin Soberalski was promised a position by the then Director John Biggin which never materialised, you told me I should have sorted it out at the time.

I said I have been in this position previously, been taken advantage of and learned by experience that once you start the position it is deemed you have accepted the position. I am not prepared to be caught out like this again. I asked Mick to have the new position profiled and issue a new job description.

.....”

25. A few days after the meeting on 8 June 2020 the Claimant was drafting a letter of resignation on his computer when the Deputy Director John Ryan and the Security Director Paul Parry entered his office whilst looking at office changes and see what IT structures were available in the Claimant's office. Mr Parry saw what was on the Claimant's computer (he had not closed the page) and asked the Claimant

about it. Mr Ryan told the Claimant he should not send his letter of resignation to the Respondent but should instead see him to discuss issues, which the Claimant did later that week.

26. During this meeting the Claimant said he felt that he was being bullied into accepting the job and about his flexible working request. Mr Ryan told the Claimant that the changes would be happening and that he would be a loss to the company if he decided to leave.
27. The Claimant's line manager was away then, so he did not meet with him until 17 June 2020. He described Mr Teesdale as being angry when he came in. The Claimant was told that the decision was now formal and that from 21 June 2020 the Claimant was expected to take on the new position. The Claimant started saying this was unfair. Mr Teesdale had been told about the resignation letter even though the Claimant had asked it was kept confidential. The Claimant said he felt he was being bullied into accepting the position without the Serco Success Profile being carried out which left him with no alternative but to hand in his resignation.
28. The Claimant then offered a compromise. He said he would accept the extra four staff members from residential if his flexible working of four days a week was reinstated without any loss of salary. Mr Teesdale did not reject this out of hand and said he would enquire about this and consider it. Before Mr Teesdale responded the Claimant handed his resignation letter to him the next day, 18 June 2020.
29. On 23 June 2020, (the Claimant had not taken up the new role), Mr Teesdale replied saying the Claimant was a valued employee and the Respondent would want him to remain in employment with them. No mention was made about the compromise suggested by the Claimant. Mr Teesdale asked if it was really the Claimant's intention to resign, now he had time to reflect on it. Mr Teesdale said he would be willing to submit the job description for the Success Profile (even though he considered it not to be necessary) but that the Claimant needed to be performing the role for him to do this as at that time the role had not been fully defined. He also reiterated that a further flexible working application would need to be submitted if the Claimant wanted to go back to working four days per week. This was the last meeting the Claimant had with Mr Teesdale.
30. The Claimant then used the Respondent's 'Shout Out' line to complain and was told to raise a grievance which he did on 26 June 2020. Ms Collins was appointed to hear the Claimant's grievance. A grievance meeting was held on 8 July 2020. Ms Lock from HR confirmed the Claimant's leaving arrangements by letter dated 3 July. It was confirmed that the effective date of termination would be 31 July 2020.
31. The outcome of the grievance was sent to the Claimant on 30 July 2020. The Claimant was largely successful.
32. The Claimant received the outcome one day before the notice he gave expired. Notwithstanding the largely favourable outcome, the Claimant did not retract his resignation or ask for his notice to be extended to appeal. As such contract of employment terminated on 31 July 2020. When asked why he did not seek to retract his resignation he said it was too late as it was the day before his contract was due to expire.
33. The Grievance Report was 7 pages long and discussed each of the matters the Claimant had raised. Ms Collings said:

"Mr Jarvis noted that he felt bullied into taking the new role and that he had submitted his

resignation due to Mr Teesdale's 'bullying tactics'. I could not find any evidence of bullying in Mr Teesdale's approach and conversations. He was asking Mr Jarvis to fulfil a new role which he believed to be commensurate with Mr Jarvis grade and there are no evidence of threats or repercussions from him not doing so. In fact, Mr Teesdale remained professional and courteous throughout his conversations and e mail exchanges with Mr Jarvis.

When asked in interview if he had reported the issue of bullying with anyone during this time, Mr Jarvis stated he had not, and in his proposal for resolution Mr Jarvis had not made a separate request for the claims of bullying to be addressed before he could reach closure. He stated that he would take on the new role working for Mr Teesdale as long as he could still receive 5 days salary for working 4 days so it appears that whilst Mr Jarvis has noted that he had perceived he was being bullied he was content to continue to work for Mr Teesdale.

It is also clear that it was never Mr Teesdale's intention to seek Mr Jarvis resignation and he did all he could to encourage Mr Jarvis to reconsider this action, even offering the opportunity to retract it as he felt it may have been made in haste.

"In respect of the concern that additional unrelated areas of management responsibility were being added to the role without a clear success profile being submitted for benchmarking prior to taking up the role to ensure that the Current salary was commensurate with the job weighting of the new role, I consider that this request was not unreasonable and should have taken place.

In respect of the concern that Mr Jarvis willingness to increase his working days to 5 during COVID 19 to assist with the running of the prison was deemed as a permanent change to his flexible working agreement. I again consider that it was not unreasonable for a formal review as per policy to be undertaken of those flexible working hours when it became apparent to Mr Teesdale that there had been a misunderstanding and that Mr Jarvis had only adjusted his hours on a temporary basis as it had always been his intention to return to the working pattern that was in place previous to this.

However, I do not consider the resolution suggested to solve the grievance is reasonable I therefore consider that the grievance be partially upheld.

Recommendations

A comprehensive success profile for the role Mr Jarvis was being asked to undertake to be submitted for benchmarking to ascertain the correct job banding and salary commensurate with that role, prior to him undertaking it.

Request that a formal review as per Serco policy of Mr Jarvis flexible working hours agreement take place without the need for him to submit a new application"

34. The Claimant appealed the outcome of the grievance on 12 August 2020. His grounds of appeal were in relation to his view he had been bullied by Mr Teesdale and that his suggested resolution had been rejected. The Claimant said he would not have resigned if the points raised in his grievance were upheld. The outcome of the appeal was communicated to the Claimant on 6 November 2020 and upheld the findings of the grievance.

Conclusions

35. Having found the factual matrix set out above, I have come to the following conclusions on the balance of probabilities.
36. For the claimant to succeed in a claim of constructive unfair dismissal he must show that the respondent committed a breach of contract which is fundamental and shows that the respondent no longer considered itself bound by the contractual terms. The Claimant must show that he has not affirmed the contract, which can happen if the Claimant continues working for a time after an alleged breach of contract and the Claimant must show he resigned because of the breach and not for any other reason.
37. The breach of contract does not necessarily have to be a breach of a contractual term but can be breach of an implied term for example the implied term of mutual trust and confidence.
38. I have set out above all the relevant policy documents and relevant parts of the Claimant's contract of employment. I have noted that there is an apparent contradiction in that the policy states that there can normally be one application within a 12-month period whereas the template application form says there can be one application in a 12-month period and does not use the word "*normally*".
39. For whatever reason, the claimant did not refer to the respondent's policies. The Claimant he said he was aware of them saying that there were a lot of them. As a manager I would expect the claimant to be familiar at least with what type of policies there are or at least know where to look for the relevant policies if not the content of the policies. The claimant had line management responsibilities for several employees during his employment.
40. The claimant relied only on what was put on the application form and did not attempt to make a further application to go down to four days per week even though his manager Mr. Teesdale said he would be able to put in an application and that he would consider it. Despite this the Claimant did not put in an application relying on what was said in the application form. It is perhaps a pity, that he was not referred directly to the policy itself when he was speaking to Mr Teesdale. However, given the Claimant's line management responsibilities it would be reasonable to assume that he had checked the policies himself. I am surprised at the claimant did not check what the policy said.
41. The application form says "*If you are uncertain whether or not you are eligible to make a request, please contact MyHR*". There is no evidence that the claimant did contact MyHR even when he was told he could make a further application which appeared to contradict what was on the form.
42. The claimant was clearly unhappy that he was being asked to take on a new role without that role being benched mark which he thought was the normal procedure. In fact, his contractual terms which are set out above say that the employer can choose to ask him to do any other work which was within his capabilities. There was no contractual need to benchmark the role before someone started working in it. The Respondent said that the benchmarking process dealt with grades and salary and as the Claimant was already a manager it would not have changed the grade. The Claimant disputed this saying that the form confirming a change to his working days put him at a particular grade. It appears however that the Claimant was confusing a job title with the grade as the box for the grade was left blank.
43. The evidence shows that notwithstanding this contractual term, and telling the

Claimant he was to start in the new role on 21 June 2020, the respondent did not force the claimant to work in that role but sought to persuade him saying that the benchmarking exercise would be done later. He was never threatened with dismissal or any other type of sanction if he did not undertake this role. To the contrary, the respondent sought on many occasions to persuade the claimant to retract his resignation showing that it wanted the employment relationship to continue.

44. I find that the Respondent did not commit a fundamental breach of contract sufficient for the Claimant to claim constructive unfair dismissal. The Respondent was acting in accordance with the contract, even being willing to use its discretion to entertain another application for flexible working within twelve months of the previous one. The norm was one application in a 12-month period.
45. In all the circumstances I find that the Claimant resigned and his claim of constructive unfair dismissal is dismissed.

Employment Judge Martin
11 April 2022