



EMPLOYMENT TRIBUNALS

Claimant: Mr N Llewellyn

Respondent: Melin Homes

Heard at: Cardiff Employment Tribunal

On: 24-26 May 2022

Before: Employment Judge Lloyd-Lawrie

REPRESENTATION:

Claimant: In person

Respondent: Ms Castle (Counsel)

JUDGMENT

The judgment of the Tribunal is that the complaint of constructive unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant, Mr Llewellyn, lodged an ET1 claim form on 8 February 2021 complaining of constructive unfair dismissal following his resigning without notice on 8 December 2020. The claimant relies upon a series of acts which he says individually or cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. He claims that this breach entitled him to resign and be deemed to have been subjected to a constructive unfair dismissal.

2. The respondent submitted an ET3 with attached rider setting their response on 12 May 2021. The respondent accepted that the claimant was an employee and agrees his dates of employment and work role. The respondent contends that the claimant was not subjected to any breach of the implied term of trust and confidence

and that even if they did, which they deny, the claimant affirmed the breaches and/or resigned for his own personal reasons, not related to any breach.

Evidence and Witnesses

3. The hearing took place in the Cardiff Employment Tribunal on 24-26 May 2022. The claimant represented himself and gave evidence. He brought no other witnesses but provided letters from Mr Ryan Waters, Mr Michael Mellier, Mr Graham Jones and Ms Jane Jones. In his bundle of witness evidence he also included a resignation letter from Mr Diamond.

4. The respondent was represented by Ms Castle of counsel. The respondent had four witnesses give evidence. They were Mr Stephen Waters, Mr Steve Jones, Mr Paul Williams and Mrs Caroline Morgan.

5. The parties had agreed a hearing bundle consisting of 311 pages. An email print was accepted as lay evidence with the claimant's agreement. This was labelled "Addition A".

6. Counsel submitted a written version of closing submissions which she relied upon as part of her closing.

The Issues

7. The issues were agreed at a preliminary hearing before Employment Judge Harfield on 20 January 2022. These are:

- (1) Was the claimant dismissed?
- (2) Did the respondent do the following things:
 - (a) In the period May 2020 to August 2020 the claimant's supervisor, Mark Garland, treated him in a demeaning, threatening and intimidating manner, telling the claimant and colleagues that Mark Garland was in sole charge and what he said went, criticised the claimant's work, threatening him with disciplinary action and used expletive language towards the claimant in front of colleagues. The particular instances the claimant relies on are:
 - (i) On 21 May 2020, while cleaning a property, Mark Garland told the claimant his work was not good enough.
 - (ii) On 21 May 2020 at the same property £1.20 was found and the claimant said it should be given to charity. Mark Garland said words to the effect "bet you fucking will, you'll pocket that yourself".
 - (iii) On 27 May 2020, while cleaning a property, Mark Garland deliberately put black marks on the windows after the property had been cleaned as a means to chastise the claimant.

- (iv) On 27 May 2020 Mark Garland asked the claimant if the windows had been cleaned upstairs. When the claimant said they had been Mark Garland said words to the effect, “No they fucking haven’t as I put two black marks on the window and they are still there”.
 - (v) On 8 June 2020 £1 was deliberately left at the property to test the claimant.
 - (vi) On 8 June 2021 Mark Garland telephoned the claimant and asked the claimant what he had done at Swan Street address and complained about the quality of the work carried out.
 - (vii) On 9 June 2020 the claimant had a meeting with Mark Garland and Steve Waters where Mark Garland said, in response to the claimant saying he felt he was being entrapped, “fuck off, we’re not in the fucking movies”.
 - (viii) On 6 June 2020 the claimant had a long and difficult cleaning job. On his return to the office Mark Garland said in front of others words to the effect, “what the fuck have you been doing for the last 3½-4 hours?”. When the claimant tried to comment on the state of the property, the amount of glue to be removed and the quantity of debris to be bagged and removed Mark Garland told him “fuck off” and argued about the state of the property and time taken. Steve Waters interjected saying the conversation was overheated and should be taken into the office. Mark Garland said to the claimant words to the effect, “Look, I want no fucking excuses. You’re going on cascade as a bad mark. Your work isn’t acceptable”. When the claimant attempted to reply Mark Garland left the office.
 - (ix) On 11 August 2020 Mark Garland attended a property the claimant was working at and said words to the effect, “I see your mum buddy, Mike Diamond, is on the sick again, why’s that?” and then laughed.
- (b) No action was taken to address Mark Garland’s behaviour when the claimant made efforts to raise his concerns. In particular:
- (i) The claimant tried to raise matters informally with Mark Garland when they happened on 21 May, 27 May, 8 June, 12 June and 11 August, but was told to “fuck off” or words to the effect, “If you don’t want the fucking job there are plenty of people outside who would. I can put you on discipline and get you sacked”.
 - (ii) On 27 May 2020 the claimant requested a formal meeting with Steve Waters and Mark Garland. The meeting became quite heated, but no action was taken by Steve Waters.

- (iii) On 9 June 2020 the claimant requested a formal meeting with Steve Waters and complained about the events of 8 June, including showing Steve Waters photographs the claimant had taken. The claimant said he was not happy with the way he was being treated or spoken to and believed he was being set up. Mark Garland said, “fuck off, you’re not in the fucking movies”. No action was taken.
- (iii) On 12 June 2020 Steve Waters said the conversation between the claimant and Mark Garland was overheated and should be taken in the office, but then did not attend the meeting.
- (iv) In September 2020 the claimant made enquiries about the grievance process with Bev Jones, who said she would inform Paul Williams and would give Mr Williams the claimant’s contact details to talk things through. Paul Williams then made no contact with the claimant.
- (v) On 16 October 2020 the claimant raised a formal grievance, which at the date of his resignation was unresolved. He did not receive an acknowledgement of his grievance until 12 November 2020. By the time of the claimant's resignation no grievance meeting had been arranged and he had not received further contact about progressing his grievance.
- (c) The claimant was ostensibly called to a welfare meeting on 25 November 2020 with Steve Jones and Mark Davies but the meeting was not intended to discuss the claimant's health but to inform him of the telephone call that had been received and to accuse the claimant of having worked on sick leave.
- (d) At the welfare meeting the claimant was questioned about the grievance.
- (e) The claimant was not offered the right to be accompanied at the welfare meeting.
- (f) The claimant was told he needed to meet a manager, Steve Jones, to sign notes of the welfare meeting on 4 December 2020. Steve Jones was not wearing a face covering and the claimant had to lean into the passenger side of the vehicle for a surface to lean on and to use Steve Jones’ pen. The claimant says there should have been a briefing with him about the respondent’s COVID-19 policy before the meeting. The claimant says that social distancing and other measures were not adhered to. The claimant says a face covering should have been offered to him and worn by Steve Jones. The claimant says there was no hand sanitizing, hand washing facilities or cleaning of the pen. The claimant says he was at a higher risk due to a respiratory medical condition. The claimant says he was made to sign the notes under duress without having a

chance to read them properly, and when he said he had not really read them yet Steve Jones stated, “whatever happens these notes need to be signed today”. During the hearing the claimant stated the issue in relation to the notes was not part of his complaint, and therefore that matter does not form part of his constructive unfair dismissal claim.

- (g) Did that breach the implied term of trust and confidence? In order to answer that the Tribunal will have to decide:-
- (i) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
 - (ii) whether it had reasonable and proper cause for doing so.
- (h) Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- (i) Did the claimant affirm the breach before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach?
- (j) If the claimant was dismissed, what was the reason or principal reason for his dismissal i.e. what was the reason for the breach of contract?
- (k) Was it a potentially fair reason?
- (l) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

The Relevant Law

8. In a constructive unfair dismissal claim the burden is on the claimant to show, in accordance with the authorities of **Western Excavating Ltd v Sharp** and **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978**, that the following occurred:

- (1) The respondent has committed a repudiatory breach of the implied term of trust and confidence. To answer this question the Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. This may incorporate a one-off act or be part of a course of conduct which, taken together, may be viewed as such a breach and whether the respondent had reasonable and proper cause for doing so.
- (2) The claimant then has to show they left because of that breach of contract.

- (3) The claimant then has to show that they have not waived the breach by affirming the contract.

9. If the claimant satisfies the above three stage test the Tribunal then has to consider was the dismissal otherwise fair and reasonable within the meaning of section 98(4) of the Employment Rights Act 1996.

10. Where the claimant is relying on a “last straw” argument in a series of acts **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493** tells us that the last straw act does not need to be the same as the previous breaches, but it must contribute to the breach. It can be a relatively minor significance, but it cannot be trivial.

11. The burden of proof is on the claimant to establish if there has been a repudiatory breach of contract. If he fails, the claim ends there. If he succeeds, I can go on to the second stage of the test.

12. I will take each of the allegations in turn to decide if they can individually or cumulatively be viewed to amount to a repudiatory breach of contract.

Findings of Fact

13. I make the following findings of fact based on the balance of probabilities.

14. The claimant was employed by the respondent as a handy person from 7 April 2012 to 8 December 2020 when the claimant resigned.

Allegations relating to 21 May 2020

15. The claimant claims that Mark Garland told him his work was not good enough. He did not give evidence on this specifically but accepted in response to general cross examination in relation to being pulled up on performance issues that Mark Garland was tasked with managing the performance of the voids team, and that Mark Garland may have had a higher standard in cleaning than the claimant, so he may genuinely have considered the claimant's work to be substandard.

16. This cannot be said to have been an act that breached trust and confidence. It was an appropriate interaction between an employee and a supervisor.

17. The second allegation is that Mark Garland, on knowing that £1.20 was found by the claimant and the claimant saying he would give it to charity, said “bet you fucking will, you’ll pocket it”. No evidence was heard from Mark Garland in this case, and I was told that he had left the employment of the respondent by resigning.

18. The claimant has however provided some evidence which he says corroborated his claim. The first was a letter from Graham Jones. I find that I can give the letter from Graham Jones, and indeed all letters of witnesses as provided by the claimant, little weight as the evidence was not tested by cross examination as they did not attend. However, even taking Graham Jones' letter at its highest level it said that Mark Garland said, “Yeah, I bet you do, probably pocket it”. In the claimant's further and better particulars at page 75 of the bundle the claimant gives

the quote as “Bet you do, you’ll pocket that yourself”. The claimant states this was the first time he met Mark Garland.

19. The claimant claims that he wrote contemporaneous notes of the incident, however that incident on page 172 of the bundle is dated 11 May 2020. The claimant accepted that he had likely been mistaken and the date was in fact 21 May 2020. In this note he gives the quote as “I bet you fucking do”. This is of course different again.

20. I find on the balance of probabilities that Mark Garland made some comment along the lines of “I bet you do” when the claimant explained he gives money found to charity. I find the claimant's note was not written contemporaneously as the date would not be stated to be ten days earlier if that was the case. I also find it more likely than not that Mark Garland did not swear in this interaction as it was not claimed to be the case in the letter of Mr Jones nor the further and better particulars of the claimant. The exact phrase used has changed. I find that this comment was not really appropriate between a supervisor and his subordinate, particularly on the first day of meeting, but I find that it was likely attempt at banter with the claimant. I find that should Mark Garland have thought the claimant was actually pocketing money found it is likely that he would have started an investigation into the same of raised the matter again. He did not.

21. I find that the second allegation occurred in a similar way as described by the claimant but has been overexaggerated both in substance and in offence taken. I find that this is not so sufficiently serious as to amount to an action capable alone of amounting to a breach of trust and confidence, or indeed could form part of a continuing act.

Allegations relating to 27 May 2020

22. The claimant claims that Mark Garland put black marks on the window in a property he was cleaning and then asked him if the windows had been cleaned. He claimed that when he said they were Mark Garland said, “No they fucking haven’t as I put to black marks on the window and they are still there”.

23. The claimant’s was the only evidence heard on this point. However, in response to a question under cross examination as to why he did not rephotograph the windows after Mark Garland put the marks on, he explained that he did not go to check if black marks were on the windows as he was not at the property when Mark Garland phoned him as he had cleaned the windows previously and was on another job.

24. In his further and better particulars at page 79 of the bundle the claimant claims that he and the team were in the property when Mark Garland attended and said the comment. In his diary note at page 173 of the bundle he says that Mark Garland appeared at the property and then said the comment to him. He also said that he asked for a meeting with Steve Waters and the three of them then had a meeting the same day. Later in cross examination the claimant accepted that the meeting did not take place until 9 June. The note dated 27 May 2020 therefore

cannot be a contemporaneous note as claimed, as it talks about a meeting that did not take place until 13 days later.

25. I find that the claimant is not consistent on what was said as I find that he did not consider this to be a major issue at the time. I find that in the respondent's workplace, like many workplaces, swearing exists in normal conversation. The claimant appears to have had no issues with the fact that Steve Waters swore in conversation with him about being annoyed with Mark Garland for not giving him a code to the cupboard. I find that Mark Garland, as stated by Steve Waters, was tasked with improving standards in the voids team. I find that he challenged the claimant on his standards of work and the claimant did not like it. Whilst I find that it is perhaps not the most appropriate method of managing performance, I find that Mark Garland was undertaking his function of supervision and was pulling the claimant up on his cleaning work, which I find was a normal employer/employee function. I find that this is not sufficiently serious so cannot be said to be a breach of the implied term of trust and confidence.

Allegation of 8 June 2020

26. The claimant claims that there was £1 at the property which he thought was left out to entrap him. The claimant accepted that he had no evidence that was the case and that there was often money found in properties. He claimed the money would not be normally found placed nearly in plain site but conceded in cross examination that someone else could have found it and placed it there.

27. I find that there is no evidence that the respondent in fact did anything at all on this occasion and it is simply therefore not capable of amounting to a breach of contract.

Allegation of 9 June 2020

28. The claimant claims that he had a meeting with Steve Waters and Mark Garland when Mark Garland said in response to the claimant claiming entrapment, "fuck off, we're not in the fucking movies".

29. In the claimant's note of the meeting at page 174 of the bundle the claimant claims that he felt entrapped in relation to the black marks and that Mark Garland said to him "this is not the movies". The claimant, when asked why he did not include the swear words in his diary note, first said it was because he did not know he could swear in court documents. However, in the very same diary entry on the page before he has used the word "fucking" and therefore that is not a sustainable position.

30. Steve Waters gave evidence that the claimant in the meeting had been talking about the £1 coin found and that he had been taken photographs in case of entrapment. He was adamant that Mark Garland had not sworn at the claimant in that meeting.

31. I find that on the balance of probabilities the evidence of Steve Waters was correct, and the claimant was complaining of entrapment in relation to the £1 as he

claimed in his further and better particulars and that Mark Garland had made a comment about this not being in the movies, as he was somewhat baffled by the allegation. I find that this cannot be said to be anything more than a standard interaction between a supervisor and employee who is claiming they are being entrapped. Mark Garland was explaining this was not the case. There was not any inappropriate conduct that can be said to be a breach of contract.

Allegation of 12 June 2020

32. The claimant claimed that he had a difficult cleaning job. He explained in cross examination that the job took longer than the time allocated on his tablet. On return he claims that Mark Garland said, “what the fuck have you been doing for the last 3½-4 hours?”. He claims that he tried to answer and was told to fuck off, and that Steve Waters interjected and told them the conversation was being overheated and they should take it into an office. Steve Waters said that he did not hear any swearing, that the conversation did become heated and that he did tell them to take it into an office, but he told them to come and get him if necessary, but that neither the claimant nor Mark Garland did. The claimant also accepted that Steve Waters did say this and that he did not complain to Steve Waters after that meeting.

33. I find that the language as claimed by the claimant did not occur. I find the respondent has been clear that swearing does occur in their workplace between staff and that therefore the respondent would have no problem in acknowledging the swear words if they had been said. I find that Steve Waters’ evidence was credible. He stated that the conversation became heated. I find the conversation became heated on both sides as Mark Garland challenged the claimant on what had taken him so long and the claimant, as demonstrated by his questioning of the witnesses, felt that Mark Garland should not be in the role he was in and did not like his work being questioned. I find that it is entirely appropriate that Mark Garland questioned the claimant as his line manager. I find that as the claimant did not avail himself of the opportunity of having Steve Waters join him, or indeed complain to Steve Waters post meeting about the incident, that he did not consider it to be a big deal and that the conversation was heated from his side also. I find this cannot be said to be an incident that could breach trust and confidence as it was not sufficiently serious.

Allegation of 11 August 2020

34. The claimant alleges that Mark Garland attended a property the claimant was working in and said, “I see your bum buddy Mike Diamond’s on the sick again, why’s that?” and then laughed.

35. The claimant in his diary note that he had dated 11 August 2020 stated that Mark Garland said as he came out of the van “I fucking see your bum buddy is on the sick again”. On a second diary entry, this time dated 12 August 2020, the claimant recounts the same incident with a different date and says that Mark Garland turned up and said, “I see your bum buddy is on sick again”.

36. I find that these notes have not been written contemporaneously and the claimant would not have written them on consecutive days, and he would have known what day the event occurred, if it indeed occurred on that day. At one stage

the claimant claimed in his further and better particulars that he believed his sexuality was being brought into question. However, in response to cross examination he accepted that he did not think that Mark Garland was accusing him of being in any kind of relationship with Mike Diamond.

37. I find that the claimant has changed his version of events on this many times and that it is more likely than not that Mark Garland made some enquiry in a non-aggressive manner asking where his “bum buddy” was. I find that the language is not appropriate, however I accept that it is phraseology used by people to indicate close friends. I find that the fact that the claimant knew that Mark Garland was not suggesting that Mike Diamond was, for example, his boyfriend, is evidence that he knew in what way the term was being used. I find that whilst this is not a particularly appropriate way to discuss a colleague, it is not conduct that could be said to be so serious as to breach trust and confidence.

The grievance procedure and welfare meeting

38. I will deal with these matters together.

39. The claimant claimed that he went off sick, which is accepted, and that in September 2020 he asked for the grievance procedure and that Bev Jones said that Paul Williams would be asked to call the claimant and that he had made no contact with him. The claimant accepted on seeing Addition A that the grievance policy had been sent out to him in September.

40. I find from the email in Addition A that the claimant requested the policy and that it was sent the same day. I find that the respondent acted appropriately.

41. I find looking at page 201 of the bundle, an email dated 14 October 2020, that the claimant is confused about the chronology of events. He asked and requested the grievance policy in September which was posted to him the same day. I find that he then rang Bev Jones on 14 October, as per the email, and said that he was unhappy with the way Mark Garland had spoken to him and that she advised that Paul Williams would call him back. Paul Williams stated that he tried to call him on 15 October 2020 but that the claimant did not answer or return the call.

42. As the claimant is confused about the chronology and accepted, in speaking to Mrs Morgan, that he may not remember things as he was drinking a lot at the time, I find that I prefer the evidence of Mr Williams, that he did try to call the claimant. I find that that was appropriate.

43. The claimant then submitted his grievance on 16 October 2020. The claimant claims that this was not dealt with, but I accept the evidence of the respondent that they had a skeleton staff in the office at the time and that the grievance was not seen until 5 November 2020. Given the COVID restrictions I take judicial notice that there were postal delays and work from home recommendations at that time. I therefore find that it was a credible position.

44. The respondent acknowledged the grievance the same day they found the grievance and then appointed Mrs Morgan on 3 December 2020 after checking with

her manager that she could be released. Again, considering the COVID restrictions at the time and normal work practices, I find that this was acceptable and appropriate.

45. The claimant claims in his resignation letter that what occurred in the welfare meeting was “the focus of his decision to resign”. During the welfare meeting the claimant was advised that he was having a change of line manager. He was asked what outcome he wanted from the grievance and he was advised that an anonymous call had been made about him. The claimant in oral evidence claimed that he should not have been told about the call in that meeting and that was a big issue for him.

46. I find that the welfare meeting in its entirety was appropriate. The claimant had told Occupational Health that he was off due to problems with his line manager. He was told that his line manager would change to Steve Jones and was asked what outcome he wanted in the grievance. I find that this was again appropriate. It was not a grievance meeting, so he had no right to be accompanied, however the claimant had told Occupational Health he was off due to conflict so I find it appropriate that the respondent asked this question as it would enable them to know if they needed to do more than simply change the claimant's line manager in order to facilitate his return.

47. I find that the respondent should and were appropriate in disclosing to the claimant the allegation made against him as the caller had spoken about the claimant's health issues. I find it appropriate this information was shared with him and I find it appropriate that the respondent waited for a face-to-face meeting. The claimant was off on sick with mental health problems and to call him to discuss this or putting it in writing may have caused more fear. The respondent was clear they told the claimant in that meeting that no action was being taken to investigate the allegations made in the anonymous call.

48. The claimant does not suggest that the respondent was lying about the call. To the contrary, he claims that he knows who made it. The stress from that meeting, and I find there was stress created in that meeting, was caused by the person who made the anonymous call. That cannot be attributed to the respondent.

49. The claimant claims that he resigned when he did as he had had enough and that things were not being progressed in relation to his grievance. Caroline Morgan stated that she had had a pleasant conversation with the claimant the day before he resigned and that they discussed whether he would prefer a face-to-face or remote hearing and a location for the same. She expressed that she had told the claimant that she wished to hold it that week and that the claimant was unsure of his medical appointment and said he would let her know. The claimant claims that he does not recall this phone call. However, the claimant was clear when putting things to other witnesses that they were saying things that were untrue or very different to how he remembered. He did not do this to Mrs Morgan. Instead he said that he maybe could not recall it as it was drinking more at the time due to his anxiety.

50. I find that the claimant would have remembered at least the very next day that a call occurred. I also find that as the claimant can remember earlier dates he would not be confused as to whether or not this occurred. Mrs Morgan was clear this call

took place, she knows what was said and has a diary entry. I find that this call took place. I find that this shows that the company were actioning the grievance promptly. I also find that the claimant knew that they were. I find the claimant resigned knowing that the respondent was trying to resolve his grievance, had given him a new line manager and was trying to support his return to work.

51. I find that none of the actions complained of, taken individually, can be said to be an act that was a repudiatory breach. Taking the allegations as part of a course of conduct comprising acts and omissions, I find that again they cannot be said to amount to a repudiatory breach. I find that the claimant was robustly managed by his new line manager, Mark Garland, and that he took exception to it. I find the respondent was appropriately dealing with his complaint at time of resignation. I find that the claimant knew this.

52. As I find that there was no repudiatory breach in that there was not anything so serious as to damage trust and confidence as per **Western Excavating v Sharp** and **Kaur v Leeds Teaching Hospitals NHS Trust**, even when taking the events cumulatively, it follows the appeal fails. I therefore do not need to consider the remaining points in the **Western Excavating v Sharp** test.

53. For completeness, even if I am wrong that there was a repudiatory breach of contract, I find that the claimant would be said to have affirmed the breach by continuing employment with the respondent, engaging with Occupational Health and agreeing the day before resignation to participate in a face-to-face grievance meeting. I consider that the likely reason for the claimant resigning the day after agreeing to attend a grievance meeting (although I obviously cannot be sure of the same) is that he secured alternative employment which did not require him to drive which suited him having voluntarily surrendered his driving licence at the time.

54. It follows that I find the claimant's complaint of unfair dismissal is not well-founded and fails. The claimant's claim therefore is dismissed.

Employment Judge Lloyd-Lawrie

Date 28 June 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON 28 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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