



EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Denby
Respondent: Alan Goldin Estates Ltd

Heard at: Watford, in person and by CVP as a hybrid hearing **On:** 28 and 29 April 2022

Before: Employment Judge Daley, sitting alone

Appearances:

For the claimant: Mr Daniel Denby (in person assisted by his brother)
Mr J Denby

For the respondent: Ms Jennifer Lanigan, of counsel, in attendance by video-link

JUDGMENT

1. The claimant was Constructively Dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (“ERA 1996”).
2. That dismissal was unfair within the meaning of section 98 of that Act.
3. The matter shall be set down for a Remedy Hearing.

REASONS

The claim

4. In these proceedings, the claimant claimed that he was unfairly dismissed by the respondent. His claim was that he was dismissed “constructively”, i.e., within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (“ERA 1996”). He was employed by the respondent company as a sales negotiator.
5. The respondent is a small estate agency Alan Goldin Estates Limited which was owned by Mr. Alan Goldin who subsequently transferred his interest Remi Estates (of which Adam Goldin was a director,) and sold the company to Mr. Ruocco on 31 March 2021.

The procedural history

- 5.1 The claimant issued his claim for unfair dismissal on 23 June 2021, it was received by the tribunal on the same day. On 10 August 2021, the respondent filed their reply.
6. The claimant’s claim was listed to be determined on 28 and 29 April 2022, but there was insufficient time on those two days to hear the substantive case and deal with the issue of remedy. I have given directions below, concerning the remedy hearing.

The Issues

- 6.1 What were the terms of the claimant’s contract pre-February 2021,
- 6.2 What were the terms of the claimant’s contract post February 2021
- 6.3 the reason for the claimant’s resignation, and
- 6.4 Whether there was a fundamental breach of the contract on the part of the respondent
- 6.5 Whether there was any delay on the part of the claimant which amounted to affirming the change in contractual terms.

The Hearing

Attendance

7. The hearing, which was a hybrid hearing, was held on the two dates listed above, Mr Daniel Denby, attended the hearing in person with his brother Mr J Denby, who assisted him. The Respondent company was represented by Ms Jennifer Lanigan, counsel. Also in attendance on behalf of the respondent were Mr Alan Goldin and Mr Adam Goldin, Mr Paul Ruocco, and Mr Mike Horsby Solicitor. All those in attendance on behalf of the respondent attended by video-link.

8. The claimant and the respondent

8.1 The claimant commenced his employment with the respondent on 12 March 2016. He was originally employed as a sales negotiator, however at the time his employment came to an end (8 April 2021), he was employed as a Sales and Letting manager.

9. Throughout his employment up until 24 February 2021, the claimant had an oral contract of employment. It was agreed by the parties that the claimant was paid £32,000 per annum plus commission.

The Background

9.1 The claimant was employed by the respondent on 12 March 2016, his employment ended on 8 April 2021. The respondent, Alan Goldin Estates Limited is a small estate agency which as well as being involved in sales and lettings, also manages a portfolio of properties on behalf of its clients. Until 31 March the firm was owned firstly by Mr Alan Goldin, and then at some point in 2020 it was transferred to Remi Estates (a company owned by Mr Alan Goldin's son Adam Goldin). Remi Estates is also a small property management firm which operates in a similar manner to Alan Goldin Estates. The director is Mr Adam Goldin.

10. It was the claimant's evidence that he was unaware of the transfer, albeit that Mr Goldin's evidence was that Mr Denby had been informed of the transfer by him. However, for reasons which are set out below, I preferred the evidence of Mr Daniel Denby.

11. Despite the transfer of the business to Remi Estates, I find that nothing changed in the day-to-day management of the firm, and Mr Denby continued to consult with Mr Alan Goldin. The claimant stated in his evidence, which I accepted that he was also under the impression that the direction of the firm was likely to change once Mr Alan Goldin retired and the firm was managed on a day-to-day basis by Mr Adam Goldin.

12. I heard evidence from both parties that Mr Denby had some frustrations about the way in which the property management side of the business was progressing. He wanted to encourage the owners of the managed property to be proactive about repairs and maintenance of their properties. He considered that this would be in their long-term investment interest. He also considered that this would make the properties easier to manage and let.

13. Whereas, it was Mr Alan Goldin's view that most of the property owners were small investors in property who were happy to receive their rental income and handle

repairs as and when they arose. Mr Alan Goldin understood that this was the sentiment of the owners, and it would appear, that this caused Mr Denby some frustration. It was his hope that once Mr Adam Goldin took over, he would have a more direct say in the direction of the business. Given this I am satisfied that had Mr Denby been aware of the transfer he would have referred some of his queries about the day-to-day management to Mr Adam Goldin, especial in respect of the managed property.

14. I am persuaded that Mr Denby was unaware of this transfer as he approached Mr Alan Goldin on matters that were important to him, including questions concerning whether he could have a pay rise.
15. It was not disputed that the firm was a small firm which was run as a family firm, and the loyalty that Mr Goldin enjoyed was such that staff considered themselves to be “part of the family”, and there was a degree of transparency and trust which meant that staff did not object to the lack of a written contract. Many important matters were discussed and agreed, and as such were not memorialized as is the formal practice, (for good reason) in many larger firms.
16. It was also clear on the evidence that Mr Denby was considered as a valuable member of staff, who had demonstrated he could work across the various aspects of the business. He was described by Mr Goldin as one of a “series of right-hand men that his father had employed over the 30 years in which the business had been in operation”. He was also described as being integral to the business. This was in Mr Ruocco statement, and this impression can only have been gleaned through discussions with Mr Alan and Adam Goldin.
17. It was agreed that the terms of Mr Denby’s contract are set out at paragraph 3, of his witness statement, and that this contract was in keeping with the degree of informality which was in operation within the business. The contract and its implementation were a matter of trust between the parties. This meant that when Mr Daniel Denby’s role changed, in 2018, and he undertook a greater level of responsibility; this was recognised by his employer, Mr Goldin and was implemented in his salary and the commission structure. It also meant that when the terms of Mr Denby’s remuneration were discussed at a meeting on the 28 January 2021 this informality continued.
18. I heard from the claimant, Mr. Denby and (it was agreed by Mr. Alan Goldin) that Mr. Denby had asked to discuss his remuneration, as he had a number of financial commitments, and wanted to see whether Mr. Goldin would agree to increasing his salary, whether by bonuses or by increasing his pay. He wanted some assurance that his net, take home pay, would be at least £4000.00 per month. It was Mr. Denby’s evidence that this arrangement had been agreed following his meeting with Mr. Goldin on 28 January 2021. He also believed that this pay increase was likely to be formalized in some way, following a review of his salary which was due to take place in April 2021.

19. In his evidence, Mr. Alan Goldin, accepted that he had agreed to a temporary increase in pay, he stated that this was in reference to Mr. Denby's financial situation. However, I am satisfied that the reason for his agreeing to increase the claimant's salary, was because Mr. Alan Goldin accepted that Mr. Denby was adding value to the business and that as such, he was happy to recognize this by agreeing to an increase, albeit on a temporary basis, in his salary.
20. I find it more probable than not, that Mr Alan Goldin agreed to find a way to top up Mr Denby's salary so that he achieved a net salary of £4,000 PCM. On 1 February 2021, a few days after the meeting, Mr Denby was paid £3372.26.
21. In a WhatsApp message sent by Mr Alan Goldin dated 1st February 2021, he refers to his salary being "covered until March" and "this was shown in the payslips which were provided in the bundle.
22. Mr Goldin also suggest that the claimant keep the sum of £350.00 which had been given to him as an advance as his salary had been paid late. In his WhatsApp, Mr Goldin said that "he was figuring out a way to do their arrangement". I heard from Mr Goldin that any increase in salary would only have occurred if Mr Denby provided him with a business plan. He stated that the purpose of this plan was to demonstrate that increased sales in the business would increase the turnover of the business. I am not persuaded that Mr Goldin had linked a salary increase to a business plan, given Mr Goldin's knowledge that he would not be involved in the business after March 2021.
23. If I am wrong concerning this, and Mr Goldin, had promised to review his salary in April following the production of a business plan, then in my view this would support Mr Denby's claim for a breach of trust and confidence, as Mr Goldin would have asked for the plan knowing that however well put together the plan was, he would not be in a position to agree a further increase in salary in April 2021.
24. Mr Denby's evidence was that on the basis of their discussion, he believed his salary would be guaranteed at £4000.00 net until March 2021. I accepted Mr Denby's evidence that Mr Goldin informed him that a further discussion would take place in April 2021 and that he expected that this would result in a permanent increase in his salary. At that time Mr Goldin was aware that the business was being sold and that he would not be responsible for Mr Denby's salary after that date. However, I find that this reassurance was given largely to secure Mr Denby's cooperation and to keep him on-board as a valuable employee who would assist with running the business once it had been transferred.
25. In February 2021, Mr Adam Goldin informed all the staff that "due to issues with compliance" they would be required to have a written contract of employment. I heard from Mr Denby that Mr Goldin attended the offices, Covid protocols were still in place however, he attended at a time when the majority of staff were in the office.
26. In respect of the contract which was signed on 24 of February 2021, unbeknown to the claimant, this had been put in place to comply with the *Heads of Business*

which were in essence pre-contractual terms which had been agreed by Mr Rocco with the owners of the respondent company as part of the terms of sale.

27. The heads of business set out that the contract with staff was supposed to reflect the existing undocumented employment contract. However, it would appear that Mr Adam used a template provided for him which instead set out Mr Rocco's existing employment contract terms with his staff which were less generous in two key details.
28. I find that the terms of the oral contract which Mr Denby enjoyed were superior to that used by Mr Rocco for his employees. There were two omissions to the signed contract, firstly Mr Denby's holiday entitlement included an entitlement for all of the bank/ Christian holiday's such as Christmas, and these were additional paid holidays to his annual leave entitlement. He was also entitled to all of the Jewish holidays, which were additional to his annual leave. He was also entitled to 15% commission on business that he introduced.
29. I find that Mr Denby failed to object to the omissions in the contract concerning holiday leave, however his evidence was, (which I accepted) that this was based on his understanding, that he had a relationship of trust and confidence with Mr Goldin, and that he could trust him to imply into the contract any terms which had previously existed.
30. His evidence was that he had been led to believe that the written contract was a formality, and, it was for this reason that he did not insist on a copy of the contract or raise any issue concerning the missing provisions concerning the additional holidays, albeit that he raised the issue of the 15% commission with Mr Adam Goldin. He was reassured by Mr Alan Goldin that this would be implemented. In his closing submissions, the claimant also referred to the existence of restrictive covenants, on terminating his contract which had not previously been a feature of his oral contract.
31. In his evidence Mr Rocco stated that had he been advised of the omissions that he would have reinstated the terms, however this did not address the restrictive covenants.
32. It was accepted by the respondents that at the end of 2020, both Mr Goldins' formed the intention to sell the business. I accepted their evidence, that there were good commercial reasons why Mr Denby was not entitled to be consulted, and as such it was entirely appropriate for the discussions concerning the business to be kept secret from Mr Denby in his role of an employee. However, I find that the discussions which occurred with Mr Denby went further than merely keeping him in the dark, about what was occurring, and that they amounted to reassurances, that the business was likely to remain a family business for the near future and that he would be informed of any planned changes.
33. I accepted Mr Denby's evidence that he had on more than one occasion discussed with Mr Goldin whether he intended to sell the business, and that Mr Goldin had

assured him that he was not ready to retire, and that he would discuss any plans to sell the business with him first. Mr Denby in his evidence stated that had the matter been discussed with him, then he would have happily signed a non-disclosure agreement.

34. Mr Denby dealt with his decision to resign in paragraphs 34 to 38 of his witness statement. He cited a number of factors which led to a breach in the "Trust and bond between myself and my employer" as having been broken beyond repair. In his statement he referred to his employers having "repeatedly lied to him about their intentions for the business."
35. The claimant set out his submissions at paragraph 8 of his closing submissions. He stated: "*Alan Goldin's evidence is that, on 20 December 2020, he and Adam began discussions with Home Minders (London) Limited - Paul Ruocco's company - leading to Heads of Terms being agreed on 20 January 2021. That was the date that Alan and Adam Golding agreed to sell Alan Golding Estates Limited. It contained confidentiality obligations on the part of Alan and Adam Goldin and went so far as to stipulate that the staff would not be told about the sale until after completion. They say that was the reason they could not tell me about the sale until it had been completed. They did, of course, take this obligation of confidentiality much further and regarded it as requiring them to continue to actively mislead me about what was happening. In paragraph 10 of his witness statement, Alan Goldin says that on 28 January 2021 he told me "that Alan Goldin Estates Limited would only be sold if a very good offer was received". On his own evidence, that was, by omission, a lie. He had agreed to sell the company a week before telling me that. The sale price and all the financial arrangements were set out in the Heads of Terms. It was a done deal*"

The issues and the relevant case law

The issues

36. The issues in this case were as set out above, it is accepted that the claimant prior to 24 February 2021 had an oral contract of employment, the terms were agreed to be as set out in paragraph 3 of Mr Denby's witness statement.
37. After 24 February 2021, the terms changed in two material aspects, the terms in the contract did not include the Jewish holidays, and the provision concerning the 15 % commission was omitted from the contract. It was also
38. The reason for the claimant's resignation was set out in the closing argument in which he stated: - "*(4.) The sale of the company came as a complete surprise to me. I learnt that this had happened when Alan and Adam Goldin came to my home and told me that evening. This was not an arranged meeting as Adam and Alan Goldin imply in their statements. (5.) It is not my case that the sale of the shares in the company was a breach of the duty of trust and confidence. The shareholders of a company are entitled to dispose of their shares as they choose. It is my case*

that the sale of the company was, in the light of the Respondent's conduct prior to it happening, conduct that was in itself objectively likely to destroy or seriously damage the degree of trust and confidence that an employee is entitled to have in an employer"

39. I heard submissions from both the respondent's representative and the claimants on whether or not the claimant was dismissed within the meaning of section 95(1)(c) of the ERA 1996, and if so whether the dismissal was unfair. As the claimant resigned, the question whether or not the claimant was dismissed within the meaning of section 95(1)(c) of the ERA 1996, or "constructively", was determinable by reference to case law that was referred to by the claimant and the respondent.

Case law concerning claims of "constructive" dismissal

40. I was referred to the following cases by the parties

40.1 Western Excavating –v- Sharp [1987] ICR 221

40.2 London Borough of Waltham Forest –v- Omilaju [2004] EWCA Civ 1493 [2005] 1 Cr 481

40.3 Kaur –v- Leeds Teaching Hospitals NHS Trust

41. When is an employee dismissed within the meaning of section 95(1)(c) of the ERA 1996?

42. The definition of what constitutes constructive dismissal is referred to in *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C, Lord Denning MR in said this:

42.1 "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct..." I accepted that the definition to be applied is a significant breach going to the root of the contract.

42.2 Ms Lanigan in her closing argument set out a number of questions which ought to be considered which were considered in paragraph 55 of Kaur, the questions which set out the issues, were (1) What was the most recent act or omission on the part of the employer, which the employee says caused or triggered his resignation? (2) Has he or she affirmed the contract since the act? (3) If not was the act or omission by itself a repudiatory breach of contract (4) If not, was it nevertheless a part (applying the approach in Omalarji) of a course of conduct comprising several acts or

omissions which when viewed cumulatively amount to a breach of the Malik terms. (5) Did the employee resign in response or partly in response to that breach?

43. I considered each of these issues in turn:-

What was the most recent act or omission on the part of the employer, which the employee says caused or triggered his resignation?

44. I find that whilst Mr Denby had no entitlement to know about the discussions concerning the change of ownership which was commercially sensitive; Both the claimant and the respondent during the course of the evidence refer to the nature of the business as a small family firm in which the employees exercised a high degree of trust in their employer, and this was evident by the lack of concern that the claimant had concerning the written terms of contract.

45. Given this, I find that once Mr Denby became aware of the transfer of the business, he was entitled to reconsider his position and the implications of the contract which had been signed on 24 February 2021, in particular the fact that it did not mirror his oral contractual terms, in that it did not provide for all of his contractual leave, and did not provide for 15 % commission for business which was introduced.

46. I find that this contract was signed in circumstances where the respondent knew that the company was being prepared for sale, I find that had the claimant known that the company was being prepared for sale then he would have insisted on all of the terms of his oral contract being replicated.

47. I also find that the decision to tell Mr Denby that there would be a further discussion about his request for a pay rise in April, when the respondents knew that the company was being transferred and that they could not bind Mr Ruocco or his company to carry out the review, was the operating reason for Mr Denby's resignation.

48. *Has he or she affirmed the contract since the act?*

48.1 Ms Lanigan in her submissions referred to the fact that Mr Denby did not insist on a copy of the contract or raise any issue concerning the missing provisions concerning holidays, albeit that he raised the issue of the 15% commission as affirming the breach if indeed a breach occurred.

48.2 I do not find the submissions of Ms Lanigan particularly persuasive on this point. She states that Mr Denby did not raise a grievance or complain about the less advantageous terms of the contract. Until 25 February 2021, Mr Denby had operated entirely on the basis of an oral contract: in a family firm where he trusted Mr Goldin, to implement the understood terms of the contract, regardless of the written terms.

49. Once Mr Denby was made aware, that the Respondent had failed to ensure that his contract incorporated the more advantageous terms, in circumstances where he had no assurance that it was likely to be supplemented by implied terms. He indicated that he wished to consider his position and resigned shortly afterwards. I find that Mr Denby resigned as soon as he became aware that Mr Alan and Mr Adam Goldin had sold the business and given this, he had no assurance that his new employer would consider himself bound by the oral terms of contact.

Was that act (or omission) by itself a repudiatory breach of contract?

50. Having considered the reasons advanced by the claimant for resigning, I am mindful that in deciding whether an employer has breached the implied term of trust and confidence (as stated in *Omilaju*), this is a question which must be considered objectively. That is by looking at whether the respondent had done something for which there was no reasonable and proper cause and which was calculated or likely seriously to damage or to destroy the relationship of trust and confidence that exists or should exist between employer and employee.

51. The claimant was no longer dealing with the respondent firm or its directors. Mr Denby was entitled to consider that he had been asked to sign the less advantageous contract, by Mr Adam Goldin who knew that the contract was a requirement for the business going forward and was likely to be implemented by someone else.

52. Further, Mr Denby, had been informed that there was likely to be a discussion concerning his request for a pay rise in April 2021. He was entitled by objective standards to consider that, by not informing him of the sale of the business (something which I accept was not required,) whilst, however, simultaneously doing acts which were inconsistent with the owner's real long-term intention, amounted to the respondent acting in breach of the implied terms of trust and confidence.

53. Whilst I do not criticize the legitimacy of the non-disclosure agreement, I consider that representations were made by the respondents to Mr Denby which went beyond any commercial reason for non-disclosure. These acts included reassuring the claimant that his oral terms of contract would be honoured without making written provisions to ensure that it would be. And, by informing the claimant that there would be a further discussion concerning remuneration in April 2021.

54. Although I do not accept that the dismissal of the junior negotiator was part of the repudiatory breach, I consider that it underlined to Mr Denby that his role, and the informal oral approach which had been adopted by the respondents was likely to be very different going forward. I find on a balance of probabilities that the claimant relied on the implied term of trust and confidence. That is the obligation not, without reasonable and proper cause, to act in a way which is calculated or likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. I find

that the actions of the respondent damaged the relationship of trust and confidence which had previously existed.

Did the employee resign in response (or partly in response) to that breach?

55. I find that Mr Denby in considering his position, resigned as a result of the breach, the breach was implementing a less favourable contract, in circumstances where Mr Denby legitimately believed, based on his knowledge and experience that any missing terms would be implied into the contract. This was why he raised no objection at the time, however once he became aware that the contracting parties had changed, and that Mr Goldin's repeated assurance about the future of the business were false. Mr Denby reconsidered his position in the light of that knowledge and resigned.

56. I find that these were cumulative acts and the Claimant, resigned once he was aware of the significance of these acts.

The fairness of a constructive dismissal

57. In the notes to section 95 of the ERA 1996 in *Harvey*, this is said (in my view accurately):

57.1 "The fact that a dismissal is constructive (within sub-s (2)(c)) does not per se mean that it will be held to have been unfair (though in practice that will often be the case); the tribunal must still go on to consider fairness in the normal way:

58. My conclusion and my reasons for it on the question whether the claimant was dismissed constructively

59. I find that in changing the claimant's conditions of contract and failing to ensure that the terms of the contract represented the oral terms, in circumstances where the respondent had acted unfairly in representing that the business was not likely to be sold the respondent acted unfairly.

60. The respondent did not provide any reason which could be considered as fair for their actions which led to the claimant's resignation.

61. I find that the Claimant was constructively dismissed by the Respondent.

Employment Judge Daley

Date: 17 July 2022

Sent to the parties on:

22 July 2022

For Secretary of the Tribunals