EMPLOYMENT TRIBUNALS

Claimant: **Mr H Morrison**

Respondent: Mitie Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Sheffield Employment Tribunal **On:**

Before: Employment Judge Rostant

Appearances
For the claimant: In person
For the respondent: Mr C Holloway, solicitor

REASONS

(These are reasons pursuant to a request by the claimant on 1 August, Judgement having been sent to the parties on 20 July)

1. This is a claim of constructive unfair dismissal and breach of contract.

2. The matter came before me and was heard over one day, 26 June 2022.

3. There was a preliminary hearing on 18 March 2022, before EJ Murphy at which a claim against a second respondent, The Co-operative Society was dropped by the claimant as was an application to strike out Mitie Limited's response.

4. At the final hearing the claimant represented himself and gave evidence. The respondent was represented by Mr Holloway, solicitor and evidence for it was given by Mr D McCafferty, Operations Manager and Mr J Taylor, Regional Manager.

5. The respondent produced a file of documents running to some 139 pages. At the start of the hearing the claimant applied to add further document. These were six pages of emails and the claimant's duty rota for the period 1 January to 30 August 2021. Mr Holloway did not object.

The Law

6. Section 94 Employment Rights Act 1996 (the Act) gives employees the right not to be unfairly dismissed.

7. Section 95 of the Act defines dismissal and includes in the definition of dismissal, at Section 95 (1)(c), "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". That is commonly referred to as constructive dismissal. A constructive dismissal exists when an employee resigns because of a breach of a fundamental term of the contract of employment.

8. Section 98 of the Act deals with the circumstances in which a dismissal will be unfair. It places a duty on the respondent to show a fair reason for the dismissal. If the respondent cannot show a reason, Section 98(1) has the effect of making the dismissal unfair.

The issues

9. At the outset of the hearing I discussed the case with the parties to understand what I was expected to decide.

10. It is agreed that the claimant resigned his employment with the respondent on 6 September 2021. The claimant was employed as a security guard. The claimant's case is that the circumstances of his resignation amounted to a constructive dismissal. The respondent does not accept that.

11. The claimant's case is that he had a contract which meant that he was to be employed by the respondent as a security at a Sainsbury supermarket. The respondent moved the claimant, permanently, to guarding a Co-operative Supermarket without written notification. This resulted in a changed shift pattern involving not only a reduction of hours as compared to his working pattern at Sainsbury, but which was in fact fewer hours than other guards at the same shop. As another ground of complaint, this pattern involved, in contrast to his previous pattern, permanent weekends. The claimant also complained that he was prevented from treating "rest days" (i.e days when he was not scheduled to work) as holidays. The claimant also complained that the respondent failed to respond to his complaints about the switch of shops and failed to conduct a proper grievance procedure. All of these matters, either taken collectively or individually, were fundamental breaches of the claimant's contract.

12. From the above discussion I concluded that I needed to decide the following

    12.1 What were the relevant terms of the claimant's contract?
    12.2 Had any of those terms been breached by the respondent?
    12.3 Where those breaches so serious as to entitle the claimant to resign because of them?
    12.4 Had the claimant affirmed the contract following any breaches?
    12.5 Did the claimant in fact resign in response to a breach or breaches?

13. It was agreed that if the claimant could show that he had been constructively dismissed, that dismissal was bound to be unfair because the respondent could not show a fair reason for that dismissal.

14. The claimant's claim for breach of contract was based on his case that he was contractually entitled to 45 hours a week, The respondent had failed to pay his 45 hours a week for a period of time up to his resignation and was therefore in breach of his contract.

15. I concluded that I would need to decide
    15.1 Was the claimant contractually entitled to 45 hours per week?
    15.2 Had the respondent failed to provide the claimant with work or pay for 45 hours a week?
    15.3 If so, from when?

The Facts

16. The claimant started work for the respondent on 24 August 2018.

17. His terms and conditions of employment are set out in a document appearing at pages 64 to 66 of the file.

18. The claimant's place of work is described as "279351 JS Chapeltown" (the Sainsbury supermarket in Chapeltown Sheffield) or as directed by management."

19. The contract also provided that the claimant was "guaranteed minimum hours of work of 8 hours per week over a 12 week period" It then says that at the date of the signing of the contract the claimant's "anticipated hours of work" will be 45 hours over 5 days per week".

20. At a later point, the contract provides that the respondent reserves the right to change hours and location of work, in which event the claimant would be notified in writing. The same notification would apply in the event of "other changes to your terms and conditions of employment".

21. At clause 3(c) the contract also stipulates that the claimant's hours of work will vary according to the site to which he is assigned.

22. It also stipulates that the claimant could be asked to work day, night or weekend shifts as directed by the company.

23. In June of 2020, the claimant had a conversation with his manager Mrs Fish. Up to that point he had been working a shift pattern that gave him every third weekend off. Although he had originally been employed at Chapeltown, by this time he was working at the High Street, Sheffield, Sainsbury. There is no evidence that the move from Chapeltown had been accompanied by written notification.

24. I find as a fact that the claimant was not happy working at the High Street branch and asked Mrs Fish for a move. Although the claimant now denies that he asked for a move, that does not square with the email he sent to Ms Fish in April 2021,

which includes the words “the manager at sainsbury’s high street has retired,,I can go back to sainsbury’s now, because it was only him the problem,,” (see page 138).

25. It is an agreed fact that the claimant agreed to move to work at the Co-Op , Broad Lane.

26. The claimant insists that he was not told that that move was permanent. I am prepared to accept that. Nevertheless, I find, contrary to the claimant’s evidence, that it is unlikely that he was assured that it was only temporary. The claimant agrees that Mrs Fish was motivated to move the claimant at least in part by operational reasons associated with a reduction of cover at Broad Lane and there is no evidence that she knew this was likely to be short term. Even less is there evidence that the Mrs Fish knew that the other motivating factor for the move, the claimant’s difficult relationship with the Sainsbury manager at High Street, would cease to be to problem by the following April.

27. What is not in doubt is that the claimant did not get written notification of the change of the place of work.

28. Initially, and in the immediate aftermath of the move, the claimant’s hours increased,

29. However, the time came, in the claimant’s evidence after “several months” that the claimant’s hours settled down to 32 hours per week with a rota that meant that he was working every weekend.

30. He contrasted this with the fact that two other officers, returning to work in April 2021 from long term sick leave were receiving 40 hours a week and had weekends off.

31. I have heard unchallenged evidence from the respondent, which I accept, that the returning guards were “inherited” by the respondent under TUPE and had a guaranteed minimum working week of 40 hours over a certain pattern of days.

32. The claimant attempted to take paid holidays on days which were marked on the rotas as rest days (i.e days when the claimant was not required to work). These requests were refused. In January 2021 the claimant complained about this to Mr Anthony Taylor, the East Midlands Operational Manager. (see page 130).

33. Mr Taylor reminded the claimant that this was within the respondent’s policy. In evidence, the claimant agreed that the respondent was entitled to refuse requests for holiday if they were for days already demarcated as rest days on the employee’s rota.

34. On 19 April 2021, the claimant wrote to Mr Nathan McKinnon complaining about his reduced hours and the disparity between his hours and that of his colleagues. Mr McKinnon replied.

35. In the same month the claimant asked Mrs Fish to find him another store and suggested Wilco, Marks and Spencer or Sainsbury. She replied that she had no positions currently available but said that she would ask around.

36. The claimant was offered additional work at two other stores to increase his hours, both of which he refused (albeit later removing his objections to one of them only to find that the vacancy had been filled).

37. The claimant raised a formal grievance on 2 June 2021 (see 48).

38. Mr McCafferty was appointed to hear the grievance. He established at the outset of the hearing that the claimant was complaining of three things. These were that:
    38.1 The claimant was contractually entitled to 45 hours paid work a week and the respondent had not honoured that
    38.2 The respondent had refused the claimant's request for paid leave on rest days
    38.3 The claimant was receiving fewer hours (32) than colleagues who were getting 40.

39. Mr McCafferty heard the claimant's grievance on 25 June and then carried out an investigation. A copy of the claimant's actual contract was not available to Mr McCafferty as a result of a technical error. He wrote to the claimant three times asking for a copy, which the claimant refused to supply. Mr McCafferty therefore based his decision on the standard Mitie contract which the claimant had showed him in the hearing.

40. I have not seen a copy of the claimant's actual contractual document and the claimant did not say in evidence that his contract differed from the standard document produced for the file. I have therefore concluded that Mr McCafferty was right to assume that the standard terms applied to the claimant.

41. Mr McCafferty dismissed the grievance. He found that the claimant was not contractually entitled to be offered 45 hours work per week. He found that the respondent's policy on holidays was that requests to take holiday on rest days would be refused and he also found that the claimant had been moved, in part to cover long term absence. Once the returning staff members were allocated their old hours, what remained from the total contracted hours available to the respondent to offer the claimant was 32.

42. The claimant appealed and his appeal was heard by Mr John Taylor on 4 August. Mr Taylor clarified that the matters that Mr McCafferty had identified were those that the claimant was complaining about. He carried out his own investigation including speaking to the respondent's in-house legal team.

43. In a letter of 31 August, Mr Taylor rejected the grievance as it related to the 45 hours. He also concluded that it was not unfair to give the returning longstanding member of staff his old hours back and thus reduce the claimant's. He did however find that there was an exception in the holidays on rest days policy that could apply to the claimant and he partially upheld that grievance.

44. During the course of the appeal hearing there was a discussion about the failure to provide the claimant with written notification of the transfer. The notes record that Mr Taylor agreed that there ought to have been a written notification. They do not record, as alleged by the claimant, that Mr Taylor thereby agreed that the respondent was in fundamental breach of the claimant's contract. Mr Taylor denied that he said that, and I prefer his evidence as the more likely.

45. The claimant resigned on 6 September 2021. Curiously the letter of resignation was not supplied to me by either party. I accept the claimant's evidence that he resigned citing a breakdown of trust and confidence caused by biased and unfair treatment.

My conclusions

46. The claim of breach of contract fails and is dismissed. The claim is based on a mistaken assertion that the claimant's contract guarantees him 45 hours per week. It manifestly does not. Nor do I consider that any implied term, varying the written contract so as to guarantee 45 hours a week can be inferred from the fact that the claimant worked for 45 hours per week for the first 22 months of his employment. The contractual term is clear and can only be read as guaranteeing *only* 8 hours per week, expressly stating that hours of work can be varied. In the claimant's case that is reinforced by clause 3(c), referred above at paragraph 21. The fact that the respondent did not chose to exercise its right to vary the claimant's working hours for 22 months cannot lead to a conclusion that it had agreed to pay the claimant 45 hours for the whole of the period of his employment. The whole tenor of the written contract is to insist on the flexibility given to the respondent, as the business required, to move employees from one site to another, increase or decrease their hours and change their days of work.

47. It follows that any claim for constructive dismissal based solely on a breach of that express term must also fail.

48. The claimant also complains that he was required to work a rota which meant working every weekend. The express term in relation to working hours gives the respondent an unfettered right to stipulate upon which days an employee can be required to work (to meet the needs of the business). It follows that even if the claimant had enjoyed a working pattern giving some weekends off in the past, the respondent was entitled to change that. From that I conclude that the change of working pattern which followed to move to the Co-Op at Broad Lane (or at least the return of the other guards in April 2021) was not a breach of an express term of the contract. For the same reasons as in paragraph 45, I do not consider that the fact that the claimant had, for 22 months, enjoyed a settled pattern of work means that in altering it the respondent was breaching a express term of his contract.

49. The written contract is silent on any question of even distribution of hours as between staff at any particular site. There being no terms stating that all guards working at any site will be allocated the same number of hours there can be no breach of any express term in only giving the claimant 32 hours upon the return of staff used to enjoying 40 hours prior to their illness and contractually entitled so to do.

50. As to the question of refusing holidays on “rest days”, the claimant appeared to accept that that was indeed the respondent’s policy although it is not referred in the contact anywhere.

51. The forgoing matters were those dealt with in the grievance. With two possible exceptions, they are likely therefore to be what the claimant had in his mind when he resigned citing unfair treatment by the company. This is important since The Tribunal is concerned, in a case of constructive unfair dismissal, to understand what prompted the resignation. Matters which might be breaches of contract but which did not cause the resignation are not part of the picture.

52. I shall therefore deal with those matters at this juncture.

53. Although I have concluded that there were no breaches of any express term of the claimant’s contract, the terms of his resignation make it clear that there was a loss of confidence on his part in the respondent. It is well established that every contract of employment contains with in it a term (which is a fundamental term) of mutual trust and confidence.

54. Such a term can be breached by actions on the part of the employer which, individually, fall short of being fundamental breaches but which might, taken together, breach the requirement that the employer treat the employee in such a way as not to destroy that relationship.

55. The authorities make it clear that this is not a term requiring fairness or reasonableness although unfair or unreasonable conduct may add up to conduct breaching the term. On the other side, an unjustified sense of grievance on the part of an employee cannot found a complaint that the term has been breached.

56. In my finding, an employer’s choosing to exercise express contractual rights cannot, no matter what the effect upon the employee, be in in breach of the implied term unless they are exercised in an unreasonable manner. (I do not see anything unreasonable in the way in which, in this case the respondent exercised the right to alter the claimant’s hours or working pattern in each case responding to business needs).

57. Even of it is possible to breach the term of trust and confidence by the reasonable exercising of contractual entitlements, I find that in this case the term was not breached.

58. It is clear that the claimant mistakenly understood his pay provisions as guaranteeing him 45 hours a week. His mistaken belief was not the fault of the respondent and does not mean that the respondent’s reducing the claimant’s hours contributed to an undermining of the relationship.

59. The same applies to the question of when the hours were to be worked. The claimant was being required to work different hours than he had in the past. That change goes with the general contractual territory. The clamant might say that the clause about flexibility of working days was being exercised unfairly. Indeed, that is precisely what I take him to be saying about his hours, when he contrasts them with those of his returning colleagues. The unchallenged evidence from the

respondent was that the claimant's move to the Co-op was in part for operational reasons, to cover long term illness by one or more established guards. It was also the unchallenged evidence of the respondent that it has a contract with the Co-op for a certain number of guard hours and its ability to allocate work to staff assigned to Co-op shops was limited by that. The returning guards would, legitimately have had grounds for a claim of breach of contract had they not been brought back on their contractual minimum working hours and pattern. The respondent could not have chosen to spread the pain equally. Although I can see why the claimant was unhappy about the result, the respondent's adhering to its legal obligations to other staff cannot amount to conduct breaching the claimant's contract. Whilst the claimant might have hoped that the respondent would divide up the hours more equitably upon the return of the guards from illness the claimant could not expect it.

60. As to the issue of the holiday days, the claimant wanted the respondent to depart from established policy, or in other words to treat him differently, to his advantage, than it treated others. The respondent's refusal to do so, albeit mitigated by the appeal finding, cannot reasonably have undermined the confidence of the claimant in the respondent.

61. What then of the other matters referred to above which now feature as part of the claimant's case?

62. The first is the alleged failure by the respondent to deal with his complaints and then conduct of the grievance hearings.

63. There is no documentary evidence that the claimant made complaints which were not responded to. The complaints made by email (and I have seen no copies of texts or other communications) were all replied to, even if the responses were not what the claimant would wish.

64. The claimant failed to show any credible evidence that the hearings were not fully and properly carried out. Mr McCafferty did make an error as to the dates of the rota he had examined in the context of the holiday issue. He was out by a year. Had he really meant to say April 2020 he would have been looking a rota for a period *before* the claimant had been moved to the Co-op. This was obviously a slip and I reject the claimant's assertion that this was a deliberate lie.

65. Both managers made proper attempts to understand and investigate the complaints, as the documentary evidence bears out. Essentially, the claimant's complaint is that they did not uphold his complaints. That is true (with a minor exception). However, an adverse result to a fair and balanced process is not the basis for asserting that that process has contributed to or caused a loss of trust.

66. Finally, I turn to the question of written notification of change. The claimant agreed to a change of place of work. He was not notified of that change when it happened in September 2020. This was an express requirement of the contract. It applies in the case of any change to place of work. It does not stipulate that the change need be permanent.

67. Is this a fundamental term of the contract? Not every written term is. For reasons that will be clear in the paragraphs that follow, I need not decide that point. For

the sake of completeness however, I do. I consider that that requirement is not a fundamental term. I take the view that the effect of the term is to encourage good communication. It sits alongside clause 3d) which reads "if there is a change in your normal place of work, the Company will inform you with as much notice as possible". The purpose is to ensure that employees are aware of the effect for them of the changes which the respondent can insist on under the contract. In circumstances where there was a discussion between the claimant and his manager, in which the change of location was made clear ahead of the move, a failure to confirm that in writing, whilst regrettable, does not amount, in my view, to a fundamental breach of the contract, striking to its heart.

68. Be that as it may, the claimant made no complaint about that matter until the second grievance hearing the following August. He says that that is because that was the first time that he had appreciated that his move to the Co-op was permanent. Since the contract says that any change should be notified in writing this distinction does not explain the failure to complain. In any case I do not accept that the claimant did not appreciate the permanent nature of the move. Although I have found that he was not expressly told that in September 2020, I conclude that the claimant knew that that was the case. This was because he was being moved, in part, because of his unhappiness at the Sainsbury's store in the High Street. The claimant was keen to downplay this reason for the move in the hearing, but the documentary evidence already quoted points to that. Furthermore, when he wrote to Mrs Fish asking for a transfer away from the Co-op, he made no reference to the fact that his transfer had only ever been temporary. Nor did he ask to go back to what, if his evidence is to be accepted, he thought was his "permanent" place of work. Rather he offered a range of options, only one of which was Sainsbury. Further, when the claimant, instead of being returned to High Street was offered extra hours at other stores, he refused that offer but not because he was insisting on a return to High Street but for different reasons (distance to travel in ne case and a concern about racial bias on the part of a manager in the other).

69. In the circumstances, I conclude that the claimant's explanation for not raising the failure of written notification until August 2021 is not plausible. I consider that it was not a matter which he considered significant and that it only featured when it did as a make-weight. I consider that in not making any earlier complaint, the claimant had waived the breach. Nor do I accept that that matter was in any case really part of the claimant's thinking in resigning.

70. For the reasons et out above I find that the claimant was not dismissed and his claim of unfair dismissal fails.

71. Both claims having failed I dismiss them.

Employment Judge Rostant

27 September 2022