EMPLOYMENT TRIBUNALS

Claimant: Mr P Carr

Respondent: Beaumont Morgan Developers Limited

Heard at: Manchester Employment Tribunal

On: 28 September 2022

Before: Employment Judge Mark Butler

Representation
Claimant: In person
Respondent: Not attended

JUDGMENT

1. The claimant was not constructively dismissed. His claim for unfair dismissal is therefore unsuccessful.

2. For the avoidance of doubt, all claims in this case have been dismissed.

REASONS

INTRODUCTION

3. The claimant brought complaints of constructive unfair dismissal and for dismissal contrary to section 100 of employment rights act 1996. These were the claims brought on the claim form presented by the claimant on 8 April 2021.

4. The respondent was aware of this claim and presented a response to those claims. In short, they denied liability. However, the respondent did not attend the preliminary hearing that took place before Employment Judge Whittaker on 5 January 2022. Further, the respondent was not in attendance at this hearing, which was the final merits hearing.

5. The claimant presented two bundles of documents for this case. The first was entitled Bundle A. This bundle contained a document that is entitled particulars of claim (although this does differ from the particulars of claim in this case), and a

second document entitled supplemental witness statement. The supplemental witness statement was simply the claimant responding to statements produced on behalf of the respondent, albeit not witness statement produced for the purpose of this hearing. This bundle was 59 electronic pages in length. The second bundle of documents was entitled Bundle B. This contained tribunal documents and supporting evidence. Bundle B was 273 electronic pages in length.

6. The claimant gave evidence on his behalf and called no additional witnesses. No other evidence was heard in this case. The respondent had not entered a response to the claim. The claimant was not cross-examined on his evidence.

7. I have approached this written judgment with proportionality in mind. It was listed for a 3-hour hearing, which was enough time to consider the evidence and reach a decision in this case. I have apportioned a proportionate amount of time to completing these written reasons.

LIST OF ISSUES

8. The issues in this case were considered by Employment Judge Whittaker at the case management hearing on 05 June 2022. EJ Whittaker recorded the list of issues in the Annex B to the record of that hearing. It was confirmed by Mr Carr at the beginning of this hearing that these remained the issues in this case.

9. All claims in this case were brought on the basis that the claimant had been constructively dismissed. The claimant's case was that the actions of the respondent breached the implied term of trust and confidence and/or the implied term that an employer should take reasonable steps to take care of the health and safety of employees, which justified his decision to resign, and that his resignation should be treated as if he had been dismissed.

10. The claimant says that there are several actions which cumulatively breached his contract. These were as follows:

    a. Between 18 May 2020 and 01 June 2020, the claimant was unnecessarily and unreasonably required to return to work in temporary office accommodation, rather than being permitted to continue to work from home.
    b. Between 18 May 2020 and 01 June 2020, the claimant was required to attend meetings at which others were present and that this put him unnecessarily at risk from coronavirus.
    c. Between 18 May 2020 and 01 June 2020, the respondent failed to impose or arrange any system proper social distancing within the working environment.
    d. Between 18 May 2020 and 01 June 2020, that people who were at work were not required by the respondent to wear face masks, and many did not, and that this unnecessarily put him at risk.
    e. Between 05 November 2020 for a period of 28 days, the claimant was not permitted to work from home and was subject to those matters recorded at a-d above.
    f. The respondent proposed that the claimant should attend a meeting on 12 January 2021. For which the claimant says it was unnecessary for him to attend in person. And that no appropriate assurances were given as to the steps that were to be taken to ensure social distancing and the wearing of masks at that meeting.
    g. Between 06 and January 2021 to 13 January 2021, the claimant was not permitted to work from home and was subject to those matters recorded at a-d above.

h. On 11 January 2021, requiring the claimant to attend the meeting in person at the site office, at which Mark Nortley was present, and presented himself as being unwell.
i. On 12 January 2021, allowing Mr Nortley to attend a further meeting with the claimant despite him having presented as unwell the previous day. Mr Nortley sat opposite the claimant, and told everyone that as a result of his symptoms he had booked himself into a COVID test.
j. The claimant describes the last straw leading to his dismissal as being receiving, as well as the content of, the email from the Commercial Director on 12 January 2021.

11. The first issue for the tribunal to determine in this case is whether the above, paragraphs 13 a-j, breach the claimant's implied term of trust and confidence and/or the implied term that an employer should take reasonable steps to take care of the health and safety of employees.

LAW

12. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed where they terminate their contract of employment "…with or without notice in circumstances in which he is entitled to terminate the contract without notice by reason of the employee's conduct". In short this is the legal principle of constructive dismissal.

13. What this is referring to is the entitlement to bring a contract of employment to an end without notice by an employee where the employer is in fundamental breach of that contract. The leading case in relation to this is Western Excavating v Sharp [1978] 1 All ER 713.

14. In Western Excavating v Sharp it is explained that a fundamental breach of contract occurs where the claimant commits a significant breach, which go to the root of the contract of employment, or which shows that the employer no longer intend to be bound by one or more the central terms of that contract. In such a case the employee is entitled to treat himself as discharged from any further performance and resign.

15. This test is an objective test, and it is not sufficient that the employee subjectively perceives that there is a fundamental breach.

16. It is further clear from this case, that an employee relying on a breach of contract in this way must make up their mind and resign soon after the breach, or otherwise it may be held at the contract has been affirmed. The burden is on the employee to show that a dismissal has occurred.

17. A constructive dismissal may result from a breach of an express term or from a breach of an implied term in the contract of employment.

18. Lord Steyn in Malik v Bank of Credit; Mahmud v Bank of Credit [1998] AC 20 gave guidance for determining if there has been a breach of trust and confidence, when he said that an employer shall not:

> '…without reasonable and proper cause, conduct itself in a matter calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

19. Whilst conduct of the employer must be more than unreasonable, breach of trust and confidence will invariably be a fundamental breach.

20. A constructive dismissal may result from either a single act, or from the cumulative effect of a series of acts. Where it is brought on cumulative effect of a series of acts, the last act, often referred to as the last straw, need not be a breach of contract in itself but it must be capable of contributing something to the cumulative breach of contract. And this is a principle that is well developed in case law. For example, Dyson LJ in London Borough of Waltham Forest v Omilaju [2005] All ER 75 described the last straw in the following terms:

> "*I see no need to characterise the final straw as unreasonable or blameworthy conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and perhaps even blameworthy. But, viewed in isolation the final straw may not always be unreasonable, still less blameworthy. Nor do I see why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however, slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

CLOSING SUBMISSIONS

21. The claimant was given the opportunity to make oral closing submissions. These were considered and taken into account when reaching this decision.

DISCUSSION AND CONCLUSIONS

22. I reminded myself throughout reaching my judgment that the test to be applied is when of objectivity. I therefore needed to consider matters not through the eyes of the claimant, but through an objective person approach. I was also conscious throughout that the burden of proof rests on the claimant in establishing that he has been constructively dismissed, and that that is not an easy burden to satisfy. The tribunal is looking for a repudiatory breach of contract. This takes something quite significant.

23. The first question a tribunal has to grapple with is whether there has been a significant breach of contract. In this case, the claimant is submitting that the cumulative treatment of him was such that it breached either the implied term of trust and confidence or an implied term in relation to a duty of care owed to him to protect his health and safety. It is only if there has been a conclusion that there has been such a fundamental breach of contract that I would then turn to question whether the breach in question was causative of the decision to resign.

24. It is on this first part that this claim does not succeed. I am not satisfied that there has been such a fundamental breach of contract in this case when events were assessed objectively. When looked at objectively, none of the matters complained of reach that level of being a significant breach of contract, either individually or cumulatively.

25. Document 37 form Bundle B assisted me in reaching this conclusion. That document is a response by the claimant to Mr Daniel Fan of the respondent on 14 January 2021, where the claimant essentially explains that there is a difference of opinion and, ultimately, interpretation of the legal position with respect the respondent's approach. And this is where this case lies. The claimant and

respondent had different opinions as to what was the correct action that could be taken during and after lockdown.

26. Requiring the claimant to return to site and to do his work on site for business reasons relating to efficiency (especially where the claimant worked as part of a project management team), and to then attend meetings that related to the projects he was involved in are not, when looked at objectively, a significant breach of the claimant's contract.

27. The COVID regulations were open to interpretation, especially when considering the exceptions that applied to leave the confines of one's home and/or to go to work. The claimant was part of a team, co-ordinating projects, and the respondent on the claimant's own case, took the view that he was needed on site, having considered the data generally that it had collated on staff efficiency following the first national lockdown. This must and does have a bearing on my analysis. As does that this was a unique situation, where companies were trying to understand and implement the COVID laws as best they could. Getting it wrong, whether the respondent in this case did or not, does not lead to Mr Carr's resignation being a constructive dismissal.

28. The claimant simply has not satisfied me that the approach taken during the lockdowns, after 18 May 2020, in requiring him to return to the workplace was anything other than a reasonable management instruction. The claimant may view this as being unnecessary and unreasonable, but that is not a breach of his contract.

29. The same is said in relation to the instruction to return to work between 05 November 2020 and 02 December 2020. I do not repeat that already explained in the preceding paragraphs.

30. The meeting of 12 January 2021, which was explained to me as a meeting of concern to the claimant, does not reach the level of breaching the contract of employment. This meeting was due to a particular reason: the IT ability of one of the subcontractors was of such a level that an in-person meeting was needed, and there was a real need for the team to finalise the construction details of a particular project. Mr Fan when asked about this, suggested a meeting wearing masks or holding the meeting outside. Requiring the claimant to attend this meeting in these circumstances does not, when considered objectively, breach the claimant's contract such as to support a constructive dismissal.

31. Turning to the events of 11 and 12 January 2021: Mr Nortley being present in a meeting on 11 January 2021 and again in work on 12 January 2021.

    a. The meeting room itself had been risk assessed such as to be suitable for four attendees. Four persons were present. Mr Nortley presented as being unwell, potentially with COVID. I am mindful that the primary responsibility for ill-health lays with individuals when it came to COVID. His decision to attend and then his presence in this meeting would not support a finding of constructive dismissal.
    b. The claimant having to attend that meeting, which was in relation to a project that fell within his remit, in a room that had been risk assessed and which did not have more attendees than was risked as safe. Again is not causing a fundamental breach to the claimant's contract.
    c. On 12 January 2021, which is supported by the email entitled Document 34, Mr Nortley attended work on that day and was still unwell, which led to him being sent home by Mr Ian Martin (who was Mr Nortley's line manager). When viewed objectively, this event cannot be said to have caused a

fundamental breach of the claimant's contract of employment, however, close Mr Nortley was in the office. Mr Nortley's line manager's actions, does not support an argument of a fundamental breach. Instead, it appears to be actions of a reasonable line manager.

32. The email at document 34 is identified by the claimant as being the 'final straw' act in this case. I set this out in full here:

> **From:** Helen Nemeth <helennemeth@beaumontmorgan.com>
> **Sent:** 12 January 2021 10:29
> **To:** Kate Hardie <kate@beaumontmorgan.com>
> **Cc:** Chris Smith <chrissmith@beaumontmorgan.com>; Philip Carr <philipcarr@beaumontmorgan.com>
> **Subject:** private
>
> Kate,
>
> Ian has advised Mark has gone home to day complaining of a high temp. Rightly so Ian has sent him for a covid test. I assume we record as a sick day.
>
> Can you chase this up with him.
>
> As a note Phil Carr was taking photos of the proximity of Mark to him, so be aware.
>
> Regards
>
> Helen
>
> **Helen Németh**
> Commercial Director

33. The claimant, in his witness statement identified this as Ms Nemeth applying undue influence against him in anticipation of him raising a health and safety concern. And that it made him feel like he was under attack by her in collaboration with the Construction Director.

34. Considering this email objectively, this simply does not go to breaching the contract of employment. This when looked objectively is simply recording what had happened on that day and making Ms Hardie aware. This in no way, when considered objectively, contributes to a breach of any of the terms relied upon, nor is it a fundamental breach of contract in itself.

35. I have considered the claimant's case very carefully. However, none of the allegations complained of, either individually or cumulatively, when viewed objectively, is conduct by the employer that causes a significant breach to Mr Carr's contract. There is therefore no constructive dismissal in this case, and the claim

for unfair dismissal fails.

Employment Judge **Mark Butler**
Date_04 November 2022____

JUDGMENT SENT TO THE PARTIES ON
8 November 2022

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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