



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105846/2022

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Final Hearing Held in person in Glasgow on 20, 21 and 22 February 2023 at
10.00am

Employment Judge Russell Bradley

10 Mr Keith Hay

Claimant
In Person
[Assisted by:
Ms V Hay –
Claimant's Sister]

15 Arnold Clark Automobiles Limited

Respondent
Represented by:
Ms I Moretti –
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Tribunal is that the claim of unfair (constructive) dismissal does
not succeed; it is dismissed.

REASONS

Introduction

1. On 1 November 2022 the claimant presented an ET1. In it the claims
25 indicated were of unfair (constructive) dismissal and for "*micromanagement
of my job and bullying*". It became obvious that this latter claim was one
aspect of the single claim of constructive dismissal. The claim was resisted.
2. For the start of this hearing an indexed joint bundle was prepared and lodged.
It contained 128 pages. Pages 129 to 141 were added before hearing
30 evidence.
3. The term relied on by the claimant and said to have been breached was the
implied term of trust and confidence.

Issues

4. The issues for determination were:-

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- a) Through the conduct of its employee Andrew Lloyd, did the respondent without reasonable and proper cause, conduct itself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence with the claimant?
- b) In particular, did that conduct culminate in a final or last straw about which the claimant learned on his return from holiday on 19 July?
- c) Did the claimant resign in response to that conduct?
- 10 d) Did the claimant wait too long after the conduct complained of?
- e) If the claimant was dismissed was he dismissed for some other substantial reason?
- f) If so, was that dismissal fair in the context of section 98(4) of the Employment Rights Act 1996?
- 15 g) If the answer to question f is “no”, to what compensation is he entitled?
- h) In assessing any compensatory award did the claimant act unreasonably in declining to apply for a number of advertised roles?

Evidence

- 20 5. The claimant gave evidence himself. He called Daniel McGhee and Rawson Campbell, who were at the time employed by the respondent. The respondent led evidence from Andrew Lloyd, branch manager and Abi Philbin who at the time was employed by the respondent as people adviser.
- 25 6. Much of the evidence of Mr McGhee and Mr Campbell was objected to on the grounds of relevance and/or fair notice. I sustained those objections. Their evidence was therefore very limited.

Findings in Fact

7. From the tribunal papers and the evidence I found the following facts admitted or proved.
8. The claimant is Keith Hay. He was at his effective date of termination 62 years of age.
9. The respondent is Arnold Clark Automobiles Limited. It is an automotive retailer. It has about 200 branches across the UK. It has a branch in Kilmarnock which has the franchise to sell Citroën motor vehicles. At that branch the respondent employs about 36 staff. They are variously involved in sales, servicing, after sales, accounts and valeting.
10. By letter dated 12 August 2008 the respondent offered the claimant the role of valeter at the Kilmarnock branch (**pages 28 to 31**). On 14 August 2008 the claimant signed a contract of employment with the respondent (**pages 32 to 36**). Read together, that material recorded that; the claimant's employment began on 4 August 2008; he worked 39 hours per week; he was to be paid £5.52 per hour; his hours of work (as hourly paid) were 8.15am to 4.45pm Monday to Thursday and 8.15am to 3.45pm on a Friday; and the respondent set up a group personal pension plan for which deductions were made from his salary.
11. On or about 1 October 2018 Andrew Lloyd was appointed as general manager at the Kilmarnock branch. In that role he had day to day responsibility for overseeing the running of the branch. His responsibility included activities such as sales, servicing, after sales, accounts and valeting. By that time he had been a branch manager employed by the respondent for about six years.
12. On his appointment in October 2018 he was the direct "*line*" manager for the claimant. At that time, the claimant was the only valeter at the branch. Valeting work is carried out in a Bay at the branch. For some time, the Bay required refurbishment work. That work had been delayed for some time.
13. In about late 2018 Daniel McGhee began work for the respondent as a valeter in Kilmarnock. He had been employed by the respondent for about two years

prior to that in other roles. By that time the claimant was employed as Valet Bay supervisor. Sometime in 2021 Rowan Campbell began work as a valet there. In about July or August 2021 Steven McCarrison joined the valeting team from a role in sales. On or about 1 February 2022 Ryan Quail also joined that team, also from sales. By February 2022 the claimant supervised the work of his four colleagues. In the time since October 2018 the claimant's working relationship with Mr Lloyd was good.

14. Some time prior to April 2022 the respondent agreed with the Valet Bay team, including the claimant, that in exchange for an increase in pay their working hours on a Friday would change. The start time became 7.30am. The finish time became 4.00pm. The claimant understood that this change was introduced so as to bring the valeters in line with other employees' contracts. By that time the claimant also reported to Holly Dobson, area valet manager.
15. On a Friday morning in late April 2022 at about 8.00am Mr Lloyd arrived at the site by car. As he was driving close to the site, he saw into the valet bay. From what he could see, it appeared that none of the four valeters present, including the claimant, were working. It appeared to him that no cars were in the Valet Bay, and the four valeters were "*standing around*". At that time, Mr Lloyd knew that by that time of the morning they should have been working as they were being paid to work on a Friday from 7.30am.
16. At about 8.19am Mr Lloyd asked the claimant to come to his office. He did so by using the site's Tannoy system. The claimant's understanding was that to do so was unusual. They duly met. Mr Lloyd asked the claimant what the valeters had been doing since starting work that morning. The claimant told him that; two of them had been fixing a piece of Bay machinery which was prone to breaking; the others were cleaning the Bay; and none of them was able to do valet work as they did not have access to any car keys as they were in a safe, the key for which Mr Lloyd himself had on his person. Mr Lloyd suggested to the claimant that his description of their activities did not accord with what he had seen. He told the claimant that if the absence of keys was known about, and an issue, he should have raised it with him before then. The claimant left the meeting. It ended without any apparent resolution to the

issues discussed. There was no contemporaneous written record of their conversation. Both of them were visibly irritated by the other's reaction to the issues discussed.

- 5 17. Shortly after this meeting Mr Lloyd decided to oversee directly the work of the valeters. That decision was in part influenced by negative comments and complaints made by potential customers of the branch. Mr Lloyd decided that all valeting work required to be brought to him, whom failing Jonathan Finlay or Allan Darroch, two manager colleagues of Mr Lloyd. There was no written record setting out Mr Lloyd's decision, or his reasons for it.
- 10 18. The claimant's opinion was that as a result of that decision, Mr Lloyd had taken away one of his own most important duties; reviewing the valeting work of those who reported to him. The claimant saw this as being "micromanaged". The claimant's view was that Mr Lloyd had taken on responsibilities (which were the claimant's) and for which Mr Lloyd had no
15 experience or qualifications. He was unhappy as a result. Mr Lloyd did not have the requisite knowledge to be able to valet a car, but instead was able, like a customer, to be able to see a car which was not cleaned up to standard.
19. At or about that time Mr Lloyd raised with the claimant the question of customer complaints. The claimant asked for written "evidence" supporting
20 the assertion that there had been any. He did not believe Mr Lloyd that there had been customer complaints. Mr Lloyd did not show the claimant any paperwork which vouched the complaints. In or about May 2022 a customer had left a "Google review" of a car which she was interested in buying (**page 48**). It narrates that while staff were friendly and honest, "cars were dirty" and
25 she did not buy a car on that occasion. It appears that at no time prior to his resignation was the claimant shown this review. In Mr Lloyd's view, the quality of valeting remained "substandard". His view was that he was reviewing the work from the perspective of a potential customer. He knew that he was not qualified or able to carry out the valeting work himself. But he was of the view that he could form a view as to the cleanliness of a vehicle and instruct any
30 remedial work that was required. He was aware of at least one instance of a customer cancelling the purchase of their car because of its unclean state.

20. Between 1 and 8 July Mr Lloyd was on holiday. Between 6 and 18 July the claimant was on holiday. He returned to work on Tuesday 19 July. He was then absent from work by reason of illness. Mr Lloyd was again on holiday between 18 and 20 July.

5 21. On 20 July wrote to the respondent that he was resigning. It was recorded in a form, then on 20 July at 09.50 the text was transposed to an internal email. The email recorded the claimant's words, "*It is with deep regret that I am being forced to hand in my notice, for the past three months I have had to endure my department being micro-managed by general manager Andrew Lloyd. A job he has absolutely no experience of. The final straw came when I came back from holiday on Tuesday 19 July and found out to my dismay he had now started bullying the staff in the valet bay, I have had Rawson Campbell goaded into having to leave the valet bay on Monday 11 after being picked on by the GM. Rawson told the GM he was having problems in dealing with the situation as he was dealing with the fact his mother had been rushed into hospital a few hours earlier. The GMs reply was that Rawson must fill out his resignation before he leaves the premises even though he was under extreme duress, he then turned on valeters Steven McCarrison and Ryan Quail and told them if they were not happy they could go as well. This is only the tip of the iceberg but I cannot say any more without taking legal advice from an employment solicitor and taking this matter down the constructive dismissal route, the GM starts back tomorrow after a 3 day holiday. I am going to find it very difficult working for a bully during my notice period, can you please advise as I have been working for the company for 14 years with loyal service.*" (pages 41 to 42)

22. The form also recorded the claimant's proposed leaving date of 31 August. It noted his comment that he was "*very sad to leave after 14 years with the company, leaving the job I love.*" The claimant left the respondent's premises at about 10.00am. He did not attend work on 21 or 22 July. He returned to work on 26 July. He spoke to Holly Dobson that day. He told her that if Mr Lloyd were to "*pull him up for quality or anything like that he would respond with physical aggression.*" (see page 57 and 58)

23. On 27 July the claimant was certified by his doctor as being unfit for work (page 44). The period of certified absence was from 27 July to 31 August. The claimant did not attend work after 26 July.
24. On or about 30 July the claimant submitted a grievance to the respondent. He did so by completing a pro forma grievance questionnaire (pages 45 and 46). He supplied details referring to notes attached (pages 47 to 50). In the notes the claimant; referred to the April meeting; noted that it was “shortly thereafter” that Mr Lloyd began to check the valeters’ work, which he called “micromanaging”; explained his opinion on the impact of Mr Lloyd’s behaviour on Rawson Campbell; complained about the “shocking” working conditions in the valet bay; complained about the checking of Mr Campbell’s work by Mr Lloyd “in full view of all members of staff”; and suggested that Mr McCarrison’s confidence at work has been damaged by Mr Lloyd’s supervision. The claimant said in his note, “Things came to a head for me when I found out the appalling way the valeters had been treated on the 15th July by A Lloyd, demanding to know why was the negativity so bad in the valet bay.” It is likely that he found out about it on 19 July, on his return from holiday.
25. On 24 August Abi Philbin people advisor employed by the respondent recorded a telephone conversation with the claimant (pages 62 to 68). It had been fixed to take place at 2.00pm (page 54). The purpose of the call was to discuss his grievance. Pages 62 to 68 bear to be a verbatim transcription of the call. They record the claimant saying that; “for some strange reason” Mr Lloyd took over the running of his department; until the April meeting things (meaning his relationship with Mr Lloyd) had been “perfect”; his colleagues (particularly Ryan Quail and Rawson Campbell) were being belittled by Mr Lloyd; and he had not tried to resolve things informally because, in his view, the relationship was “far too broken down”. Ms Philbin is noted as saying that she may need to carry out further investigations before completing the grievance.
26. Also on 24 August Ms Philbin had telephone conversations with; Steven McCarrison; Holly Dobson; and Andrew Lloyd. Those conversations were

also transcribed and respectively became **pages 55 to 56; 57 to 58; and 59 to 61.**

27. Mr McCarrison gave two examples of instances where he believed he had been unfairly challenged by Mr Lloyd.

5 28. Mr Lloyd referred to “*a couple of complaints*” from customers, and referred to the Google review which became **page 48.**

29. On 29 August Ms Philbin had a telephone conversation with Ryan Quail. The transcription of it was **pages 69 to 70.** In it he suggested that Mr Lloyd was doing no more than his job in checking the cars, and he did not have an issue with that. On 29 August Ms Philbin wrote to the claimant (**pages 71 to 73**). In it she set out her response to his grievance under three headings. It was not upheld. Ms Philbin left the employment of the respondent at the end of August.

10 30. The claimant’s effective date of termination was 31 August 2022. By that time he was earning about £2400.00 per month (gross) and about £1826.00 (net) (see **pages 93 to 99**).

15 31. On or about 26 September the claimant began alternative employment. His first pay was on or about 7 October. He was then in receipt of State Benefits. He his currently unemployed and seeking work.

Comment on the evidence

20 32. Both the claimant and Mr Lloyd played down the extent to which they themselves had become angry or agitated in the April meeting. They played up the extent to which the other had reacted. In this forum, that is to be expected. My impression of Mr Lloyd was that he formed a negative view of four colleagues who, on the face of it, were getting an increase in pay only to be standing around doing nothing. It also seems to me that that negative view would naturally inform how he initially approached the issue with the claimant. That is borne out by Mr Lloyd’s evidence in chief on the first question which he asked the claimant; “*what have you been doing since you started?*” That question implies a belief that the truth is they were doing nothing, or not much.

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30 Similarly, my impression is that the claimant reacted negatively to the

implication. In his grievance document dated 30 July he said that at this point “*he could not believe what he was hearing*”. The implication is that he reacted badly to what he saw as unjustified criticism. He blamed Mr Lloyd for having a set of keys, and that state of affairs meant that no valeting could be done before his arrival. The claimant accepted that it was not a normal conversation. He said that Mr Lloyd was “*more aggressive than me*”.

33. The material recording the claimant’s grievance, its investigation and outcome was of limited evidential value. This is because it all post-dated the claimant’s resignation. Its use was in providing material from which to check the more relevant time period which was from April to 20 July.

Submissions

34. Ms Moretti lodged a written submission and agreed to share it with the claimant, and to speak first. It contains 16 pages. I do not repeat or summarise it other than to note; its reference to well-known case law to which I refer below; her application of that law to her suggested findings; her argument that if the claimant had been dismissed it was for some other substantial reason; and various arguments on any awards that may have been made had the claim succeeded.

35. The claimant made a short and passionate reply. With agreement from Ms Moretti, Ms Hay expanded on it.

The Law

36. Section 95(1)(c) of the Employment Rights Act 1996 provides that “(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)— (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.*” The “*Part*” of the Act referred to is Part X which governs the right to claim unfair dismissal. Subsection (2) is not relevant.

37. In 1977 in the Court of Appeal in ***Western Excavating*** Lord Denning MR describing “*the contract test*” (which he regarded as the correct test in a claim

of constructive dismissal) said, “*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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*”

38. In 2016 in ***Ishaq v Royal Mail Group Limited*** [2017] IRLR 208 in the EAT, his Honour Judge Shanks said, “*The law on constructive dismissal is well established, The basic principles come from ... Western Excavation (ECC) Ltd v Sharp ...*”.

39. In a claim in which the employee asserts a breach of the implied term of trust and confidence he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them (***Mahmud v Bank of Credit and Commerce International SA*** [1997] ICR 606). The test of whether there has been a breach of the implied term of trust and confidence is objective (***Leeds Dental Team Ltd v Rose*** [2014] IRLR 8).

40. I take the following from the case of ***Omilaju v Waltham Forest London Borough Council*** [2005] I.C.R. 481 to which Ms Moretti referred.

a) A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The phrase “*an act in a series*” is not in a precise or technical phrase. The act does not have to be of the

5 same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

10 b) There is no need to characterise the final straw as "*unreasonable*" or "*blameworthy*" conduct. Viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. 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.

15 c) If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

d) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer.

20 Discussion and decision

41. In his oral submissions, the claimant said that he did not appreciate the legal technicalities behind the concept of "*the last straw*". It is perhaps regrettable that there has been so much said (by lawyers) about what can, and cannot, amount to a "*last straw*." I note in passing that Lord Justice Dyson in ***Omilaju*** begins his commentary on the last straw doctrine by referring to a clear explanation of the concept from as long ago as 1986, referring to the case of ***Lewis v Motorworld Garages Ltd*** [1986] ICR 157.

42. In my view Mr Lloyd's conduct was neither calculated nor likely to destroy or seriously damage the relationship of trust and confidence between the parties. He was the claimant's line manager. He was entitled to oversee the work

within the Valet Bay. He was entitled to scrutinise it following customer complaints about the cleanliness of some vehicles. Mr Lloyd candidly accepted that he did not have the experience or expertise to carry out the valeting work. He did not try to do that work himself. But he was entitled to criticise it if in his view (and the view of others) was that it had not been done satisfactorily. It may be that in his discussions with the claimant Mr Lloyd exaggerated the number of customer complaints. It is probable that in his interview with Ms Philbin he was accurate when he referred to a “couple” of complaints. But in a car retail business it is self-evidently vital that potential customers are not dissuaded from purchasing vehicles because they are not clean.

43. The claimant’s best evidence as to his reason for his resignation is within the text on **pages 41 and 42**, dated 20 July. A summary of those reasons is; he and his department have been “*micromanaged*” for the previous three months; and the final straw occurred on his return from a holiday of about two weeks to find ill-treatment of a number of his colleagues.

44. In my view the increased scrutiny of valeting work by Mr Lloyd was not calculated or likely to destroy or seriously damage the relationship. It was clearly unwelcome. It caused upset. But viewed objectively and in the context of concerns about the work of the Valet Bay team it was within Mr Lloyd’s remit as the claimant’s line manager.

45. I have little doubt that the situation could have been handled better, and more tactfully. I have no reason to doubt that Mr McCarrison told Ms Philbin the truth when he described Mr Lloyd’s behaviour as going “*absolutely ballistic*” (see **page 55**). Mr Lloyd’s conduct which ultimately led to the resignation continued over 3 months to 20 July. Given my view that that conduct did not amount to a breach of the implied term it is not strictly necessary to decide whether the final straw (as the claimant described it on 20 July) contributed however slightly to the breach of the implied term of trust and confidence. But in my view it did not. The alleged last straw conduct is in fact the interaction of Mr Lloyd with others, albeit close colleagues of the claimant and for whom he felt some responsibility. But it did not directly affect the claimant.

46. I answer Issues a) and b) “no”. The claimant was not dismissed. It is unnecessary to answer any of the other questions listed at paragraph 4.

47. The claim does not succeed. It is dismissed.

5 Employment Judge: Russell Bradley
Date of Judgment: 30 March 2023
Entered in register: 30 March 2023
and copied to parties