EMPLOYMENT TRIBUNALS

Claimant: **Mr E Baxter**

Respondent: **JD Sports Fashion Plc**

Heard at: Manchester **On:** 7 & 8 February 2023

Before: Employment Judge Liz Ord

Representation:

Claimant: In person
Respondent: Mr Hurd (Counsel)

Reasons for Judgment

1. The respondent asked for written reasons for the oral judgment delivered on 8 February 2023, which found the claimant's complaint of constructive unfair dismissal to be well founded, and ordered the respondent to pay the claimant compensation in the sum of £14,215.95 (subject to recoupment).

A - LIABILITY

The Issues

2. Can the claimant prove that there was a dismissal?
    - Did the respondent do the following things:

      Change the claimant's place of work contrary to clause 4 of his contract of employment dated 31 January 2016 which says:

      "Your principal place of work is based at our Head Office, or such other place as the Company may reasonably require for the proper performance of your duties."

- Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the tribunal will decide:

    i. Whether the respondent had reasonable and proper cause for those actions or omissions, and if not

    ii. Whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

    iii. Was the breach a fundamental one? The tribunal will decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

- Did the claimant resign in response to the breach? Was the fundamental breach of contract a reason for the claimant's resignation?

- Did the claimant affirm the contract before resigning, by delay or otherwise? The tribunal will decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Evidence

3. The tribunal had before it a main hearing bundle of 97 pages and a payslips bundle of 8 pages. It also had witness statements from Mr Edward Baxter (the claimant), and on behalf of the respondent, from Mr William Mansell (People Relations Business Partner).

Law

4. As per section 95(1)(c) of the Employment Rights Act 1996, an employee is constructively dismissed if: "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".

5. In ***Western Excavating (ECC) Ltd v Sharp*** *[1978] ICR 221,* Lord Denning put it as follows:
"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."

6. The implied term of trust and confidence was formulated by the HLs in ***Malik and Mahmud v BCCI*** [1997] ICR 6060 as being an obligation that

the employer shall not: *"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

7. In ***Leeds Dental Team Ltd v Rose*** [2014] ICR 94, EAT, the EAT confirmed that the test of whether there was a repudiatory breach of contract is an objective one: *"the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in his employer".*

8. In ***Frenkel Topping Ltd v King*** **UKEAT/0106/15/LA** the EAT warned about the dangers of setting the bar too low. That decision makes it clear that acting in an unreasonable manner is not sufficient.

Findings of Fact

9. The claimant worked for the respondent from January 2016 in the Customer Care Team, and was based at the Pilsworth Head office in Burnley. He worked four days a week from Monday to Thursday and his hours were 12 noon to 10pm.

10. As a Customer Care Adviser, his main duties involved dealing with customer telephone and e-mail queries, such as arranging returns and re-orders, and liaising with the respondent's retail stores, to facilitate resolutions. The Team operated 24 hours a day, 365 days a year. As with other members of the Team, the claimant had been working from home since the start of lockdown, being March 2020, although he occasionally went into the office when required. He was in regular contact with his team and other staff by remote means.

11. On 31 March 2022, the respondent sent a letter to the Customer Care Team indicating that it was considering moving the Team to the Kingsway office in Rochdale. It said the move was for a number of operational and efficiency benefits, namely, to provide a dedicated Customer Care Floor with improved training facilities, 24/7 access to all amenities including a fully operational canteen, free parking and better public transport links.

12. The proposal included the following:

    - Staff who moved were to get a pay increase over and above the basic pay review increase where appropriate.
    - There would be a combination of home and office working dependent on the needs of the business and subject to Line Manager approval.
    - Colleagues would be required to attend the Kingsway office at the request of their Line Manager on any given day.
    - All training and coaching would be undertaken at the Kingsway site.

13. The claimant was on holiday at the time the letter was sent and he was not due to return to work until 14 April. However, his manager told him about the proposal on 12 April 2022.

14. On 9 May the respondent sent out another letter to staff confirming the move to Kingsway over the coming months. The letter the claimant received said the final day at the Bury office would be 31 May 2022, although some of the teams would be required to work from home whilst building works were completed. It went on to state that this was not envisaged to be for more than 8-12 weeks, and the claimant's Line Manager would speak to him individually to discuss what it meant for him.

15. The claimant was required to work from home for a period, although he was not specifically told for how long. As the 12 weeks expired on 23 August 2022, he was under the impression that this would be the last possible date he would be allowed to work from home, unless he was told otherwise.

16. The letter referred to clause 4 which, was incorporated into the claimant's contract of 31 January 2016 and stated:

    "Your principal place of work is based at our Head Office, or such other place as the Company may reasonably require for the proper performance of your duties."

17. The claimant was concerned about the move and tried to find out more details, as nobody had spoken to him about it. He enquired about working at home permanently as an alternative, but was told by a line manager (Gemma) that this was not an option, although there might be some hybrid work. Each employee had to vote yes or no to the move and Gemma told the claimant that if he did not vote yes, he would have to resign.

18. The claimant made enquiries of another manager (Adam Walker), and told Mr Walker that he would not be able to do the commute. Mr Walker was not able to give him any more information.

19. The problem for the claimant was the time it would take him to commute from home to Kingsway and the impact this would have on his work-life balance. He was not able to drive and he did not own a car or any other vehicle.

20. There was some minor dispute about the times it would take him to commute, depending on what web sites were referenced. However, the claimant had researched this in some detail, looking at the different ways he might try to get to Kingsway, and he had made the journey previously on a couple of occasions. He came across as a straightforward and credible witness and I accept his following evidence:

    - The Pilsworth office was about 4.5 miles from the claimant's home, and it took him between 20 and 25 minutes to travel in by bike. The Kingsway office was about 13 miles from home, and this meant a commute by bike of between 1hour 20 minutes and 1 hour 30 minutes.

    - There was no direct route by public transport, and it would take between 1 hour 30 minutes and 1 hour 45 minutes to get to Kingsway. This would include using a tram and, as the claimant does not live close to a tram stop, there would be walk of between 15 and

20 minutes to the tram stop. Furthermore, if connections were missed, it could be significantly longer.

- The tram operator does not like bicycles being brought onto these trams and they are not encouraged. Therefore, it was not an option to partly use his bike and party use the tram. In any event, the claimant felt it would not make much difference to the journey time.

21. Due to his concerns, the claimant raised a grievance on 23 May 2022 suggesting, as an alternative to the office move, he work from home. He had been successfully doing all his required tasks remotely from home for over two years without any problems. He had been able to do everything asked of him from home, including conducting training. There were no issues with his performance whilst working from home. His team had adjusted to this and productivity was good. This was not disputed.

22. The respondent's witness, Mr Mansell, recognised there were many advantages to working from home, although he felt there were advantages to having staff in the office from time to time. The claimant was content to go into the Kingsway office occasionally.

23. The claimant's evidence was that he was happy to work in Burnley and travel into the Pilsworth office, and he had made this known to the respondent. The short commute had been one of the attractions of the job when he originally accepted it, and it was important to him. He put forward home working as a solution to the problem of trying to avoid the long commute to Kingsway, not because he was trying to avoid office working. The claimant answered questions on this in a straightforward and credible manner and I accept his evidence.

24. The respondent suggested ways around the commuting problem as follows:

- Car sharing. The claimant enquired of his colleagues and there were people who would help. However, because of the shift patterns, there was no guarantee they would always be available. He would have to rely on several people, and there would be problems when they were off sick or on annual leave.

- Taxis were suggested for some journeys. However, for the claimant, taxis were prohibitively expensive.

- The claimant's pay increase could be used to take driving lessons and buy a car. However, the claimant would find driving lessons very expensive, and driving tests were still generally significantly delayed after Covid. In any event, the cost of a car would be prohibitive for the claimant.

- The claimant's shift pattern could be altered so that he would not be travelling home at 10pm at night, when cycling might be dangerous.

25. There was some discussion about the possibility of hybrid working, so that part of the week might be at home and part in the office. However, it was not disputed that the respondent only suggested this as a possibility and the

claimant was not actually offered hybrid home working.

26. To try and avoid the commute, the claimant applied for two other jobs at the Pilsworth office. He was turned down for one, and the other was put on hold with no indication of when the recruitment process might recommence.

27. On 1 June 2022 the claimant was given the outcome of his grievance. It was not upheld. He appealed on 4 June. On the 23 August he received the outcome, which was that the appeal was not upheld. In the absence of any resolution to his commuting concerns, and as the 12 weeks' transitional period working from home ended that day, the claimant resigned on 23 August 2022.

28. Based on the claimant's evidence, which I accept, and the documentation in the bundle, it is clear that the claimant was happy in his job, got on well with colleagues, and did not want to leave. However, he felt that there was no alternative, as he could not do the commute to Kingsway. He did not resign because he was told he could not work from home. Working from home was suggested by him as an alternative to having to commute to Kingsway.

29. At the hearing, the respondent submitted that the additional commute had to be considered as part of the overall package, and the claimant should have waited to see what would happen and what possibilities there might have been for alternative roles in Burnley or hybrid home working.

Discussion and Conclusions

30. The first question to consider is whether the change of workplace was contrary to clause 4 of the claimant's contract. Clause 4 says that the claimant's principal place of work is "our Head Office", which is the Pilsworth office in Burnley, or "such other place as the Company may reasonably require for the proper performance of your duties."

31. There is no dispute that the claimant's place of work was changed to Kingsway. The question is whether the change was reasonably required for the proper performance of his duties.

32. The claimant had been working from home successfully for over two years. The type of work he carried out lent itself to home working. His productivity was good, there were no issues with his work and his team had adjusted to him working from home.

33. He went into the Pilsworth office on the few occasions it was required of him, and he was willing to go into the Kingsway office occasionally, as required. Consequently, the change of office was not necessary for the proper performance of his duties. He was carrying out those duties to the required standard at home.

34. Whilst there were benefits to basing the Customer Care Team in Kingsway, moving office, in the claimant's case, would have caused him significant commuting difficulties. This would not have been overcome by the increase in pay or better facilities at the Kingsway office.

35. His commuting time would have increased from 20 to 25 minutes per journey to about 1 hour 20 minutes to 1 hour 30 minutes at best. That was a daily increase from between 40 and 50 minutes, to between 2 hours 40 minutes and 3 hours, which was over 3 times longer.

36. This in itself, was a very significant increase, but added to a working day of 10 hours, would leave the claimant with very little time for anything else, and so would significantly impact on his work-life balance. There were no realistic alternative ways of travelling. Cycling or taking public transport were the only practical options, and the latter would take even longer than cycling.

37. The respondent suggested ways of overcoming the difficulty. Car sharing was put forward, but relying on others, particularly when there were different shift patterns and holidays and sickness absences to consider, was not a realistic possibility.

38. Another proposal was to take taxis or have driving lessons and buy a car, but this was prohibitively expensive for the claimant and not realistic. In any event, passing a driving test would take some time. Altering his shift pattern to avoid a late commute home was suggested, but that would not resolve the issue of the length and duration of the journey. The short commute to the Pilsworth office had been a factor in his original acceptance of the job and it was important to him.

39. Expecting the claimant to undertake the long commute to the Kingsway office on a daily basis was not reasonable in circumstances where he was performing his duties perfectly adequately at home.

40. Whilst there was some discussion about hybrid work, this was never offered to him and all he had to go on was a vague possibility dependant on business needs and his line manager. If hybrid working was being contemplated by the respondent, that should have been offered to the claimant before the end of the 8 to 12 week transition period.

41. From the letter of 9 May 2022, the claimant understood that he was expected to start at the Kingsway office at the latest by the end of the 12 week period, being 23 August 2022. In the absence of confirmation to the contrary, and in light of his grievance appeal not being upheld, that was a reasonable conclusion to draw. Under these circumstances, the claimant could not be expected to wait any longer.

42. The respondent did not reasonably consider alternatives to relocation in the claimant's case, specifically the alternative of home working. Against the background of homeworking proving successful over the past two years, and the difficulties the claimant would experience commuting to Kingsway, it was incumbent on the respondent to explore this possibility further.

43. Whilst there were some tasks that the respondent required to be done in the Kingsway office, such as training, the claimant indicated that he would be prepared to occasionally go into the office. In these circumstances, it was incumbent on the respondent to individually and properly explore

hybrid working with the claimant before the expiry of the 12 week transition period.

44. To conclude, for the reasons given above, it was not reasonable to require the claimant to move to Kingsway for the proper performance of his duties. Therefore, enforcing the move was not within the terms of the claimant's contractual mobility clause.

45. The respondent did not have reasonable and proper cause to move the claimant to Kingsway and the move was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The breach was sufficiently serious to be fundamental, entitling the claimant to resign and treat himself as dismissed. He did so, and the reason for his resignation was the breach. There is no issue regarding affirmation of the contract. The claimant did not affirm it.

46. Therefore, the claimant's complaint is well founded and his complaint succeeds.

B - REMEDY

Findings of Fact

47. The claimant searched for new employment after he left the respondent. He found a position where there was a choice of working either full-time or part-time. He chose part-time and expected to commence this role by the beginning of April 2023.

48. The parties agreed that the period of loss should be from 24 August 2022 to 31 March 2023, and that there should be no on-going loss because it was the claimant's choice to work part-time.

Respondent's submissions

49. The respondent does not take any points on mitigation.

Polkey

50. The respondent explored what the position would have been if the claimant had not resigned.

51. He would have been home working but he would have been the only one. Therefore, there was a distinct possibility of redundancy. The percentage chance of redundancy was fairly high.

52. There was one job he was waiting to hear about and there was a 50% chance he would have got it. There was at least a 50% chance of redundancy. Overall, a 75% chance would be a reasonable finding.

Other matters

53. The respondent suggested £350 for loss of statutory rights.

Claimant's submissions

54. The claimant submitted that the argument on redundancy was flawed for two reasons.

    1- He had asked about redundancy and every step of the way he was told that there was no redundancy and redundancy did not apply.

    2- He was flexible and, had the respondent discussed options with him, he was sure they could have come to a mutually acceptable accommodation.

Discussion and Conclusions

55. There are no points made by the respondent on mitigation and I am content that the claimant has sufficiently mitigated his losses.

56. The claimant had the opportunity of selecting full-time work, but chose part-time and therefore, the period of loss will be, as agreed, from 24 August 2022 to 31 March 2023.

57. With respect to the Polkey argument, there was no indication that the respondent would have made the claimant redundant if he did not move to Kingsway. The claimant had worked successfully from home for two years without issues and was preforming satisfactorily. He was in remote contact with his team and other employees on a regular basis. He was happy in his job, fitted in well, and was willing to be flexible.

58. The claimant came across as a reasonable person and he would have gone into the Kingsway office on the occasions required of him for training and other purposes. Consequently, if he continued to perform well, to keep in contact remotely and to attend the office on the occasions required, there would be no reason to make him redundant.

59. There was also the possibility of him obtaining an alternative role at the Pilsworth office at some stage in the future. He had actively pursued alternative positions at that office and there was a reasonable possibility that, at some stage, he would secure a suitable post there.

60. Under these circumstances, I conclude that the claimant's employment with the respondent was secure and I do not make any deduction for the chance of him being made redundant.

61. With respect to loss of statutory rights, I award £400.

Calculation

From 1.4.22 - gross annual salary = £19,824.60; gross weekly = £381.24

Net annual salary = £17,326.08 ; £1443.84 per month; £333.19 per week

Employer's pension contribution from 1.4.22 = £33.96

Age on 23.8.22 = 32 years

6 full years of employment with respondent

Basic award

6 weeks' gross pay.

6 x 381.24 = £**2287.44** gross

Compensatory award

£10,328.89 (31 weeks) + £133.28 (2 days)

Compensatory = £**10,462.17** net

Pension

31 weeks 2 days = **£1,066.34**

Total Compensatory + pension

£11,528.51

Statutory rights

£400.00

Benefits

Claimant was on JSA; so recoupment applies.

Prescribed element does not include pension loss or award for loss of statutory rights.

Prescribed period from EDT to date of remedy hearing 23.8.22 to 8.2.23.

Prescribed amount = 24 weeks exactly

24 x 333.19

£7,996.56

Employment Judge Liz Ord
Date 30 April 2023

Case No: 2408116/2022

JUDGMENT SENT TO THE PARTIES ON
2 May 2023

FOR THE TRIBUNAL OFFICE