



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and **Respondent**

Mr J. Copp **Mainstay Facilities Management Limited**

Held at: Plymouth

On: 8, 9 and 10 February 2023

Before: Employment Judge Smail

Appearances

Claimant: In Person

Respondent: Mr A. Shellum (Counsel)

The Judgment dismissing the claim was sent to parties on 23 February 2023. Within time the Claimant asked for Reasons. The Reasons are provided below.

REASONS

1. By a claim presented on 9 February 2022 the Claimant brought a claim of constructive unfair dismissal.
2. The Claimant was employed between 12 December 2014 and 31 December 2021 as an Estate Caretaker at the estate of private residence blocks maintained by the Respondent in the Millbay area of Plymouth. Latterly there were 4 blocks of buildings: Quadrant Quay, Cargo 1, Cargo 2 and Quadrant Wharf. The Claimant resigned by email dated 24 November 2021.

THE ISSUES

3. The issues in the case were set out in a case management preliminary hearing before Employment Judge Livesey on 25 October 2022. The issues were refined in terms of dates during this hearing. A further issue said to be the final straw in the resignation email was added without opposition because it had the importance described in that email. That becomes the 14th issue. The issues the Tribunal has examined are as follows:

1. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied terms of the contract relating to mutual trust and confidence and/or ensuring his health and safety. The breaches were as follows:

1.1 His work location was changed in May 2021 from having been dedicated to look after Quadrant Quay to a role which covered all of the Respondent's sites at Millbay.

1.2 His company mobile phone was taken from him in May 2021.

1.3 The sign in/out register was moved in the summer of 2021, such that he was required to walk a significant additional distance in order to sign in/out.

1.4 His gate fob was taken from him in August 2021.

1.5 He was required to move 85 waste bins over 4 sites which, he alleges was a 3-man task. The requirement fell on him alone from May 2021.

1.6 His car parking space was altered in August 2021.

1.7 His workplace (block 9 at Quadrant Quay) lacked a lightning conductor.

1.8 Part-time workers were given preferential choices of leave dates over the summer and at Christmas in 2021.

1.9 He was provided with a base since 2019 which was a gas meter cupboard in which there had been a sewerage leak and a broken light in Block 9, Quadrant Quay. The problems were not repaired despite having been reported.

1.10 He was required to clean a lift with no alarm call system fitted in the Cargo 2 building. The defect, having been reported by Mr Pascoe on 26 February 2020, remained un-repaired;

1.11 His face was burnt by a contractor's weed spraying in windy conditions in August 2019. Again, despite him completing an accident report, the issue was not investigated adequately or at all and the Claimant felt completely unsupported.

1.12 His October 2018 leave was cancelled as the Respondent had failed to arrange cover although it had been aware of a staff retirement 10 months earlier which created the lack of cover.

1.13 He was not appointed to the vacant position of Estate Manager in 2018.

1.14 In late October 2021/early November 2021 the Claimant was instructed by Mr Pascoe to answer the mobile phone in Mr Pascoe's absence with specific wording as follows –

'Please answer all calls in a business-like manner, for example, Good Morning/Afternoon, Mainstay, Jon speaking'. This was described as degrading by the Claimant.

2. The Tribunal will need to decide:

2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.2 Whether it had reasonable and proper cause for doing so.

3. Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to resign.

4. Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation. The Respondent will assert that some of the allegations were affirmed.

5. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act? The Respondent does not advance a credible positive case in this respect. It did not intend to dismiss the Claimant, describing him as a very good employee. It followed no procedures that would be required if it actually though it was dismissing the Claimant for conduct. It was not. Accordingly, if this was a constructive dismissal, the dismissal would be unfair.

THE LAW

4. The characterisation of the issues for constructive dismissal reflect the law. It is common ground there was no 'actual' dismissal. It is thus for C to prove a dismissal within the meaning of the Employment Rights Act 1996:

Section 95 ERA 1996 — Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer 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.

5. The Claimant must prove that: the Respondent 'without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee': Malik v BCCI [1997] ICR 606, HL [at 609].
6. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR in that case made it clear that the matter has to be looked at from traditional contract principles, not whether the employer has been unreasonable. Reasonableness is a s.98(4) concept. Dismissal is a contractual concept. He said this:

THE CONTRACT TEST

"On the one hand, it is said that the words of subsection (c) express a legal concept which is already well settled in the books on contract under the rubric 'Discharge by breach'. 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."

7. Breaking the test down, in determining whether or not the implied term has been breached, the Tribunal must ask itself: (a) Was there 'reasonable and proper cause for the conduct'? If so, there has been no breach. (b) If not, was the conduct 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'? (c) Did the Claimant resign in response to such a breach; and (d) the Claimant did not affirm the breach by conduct, in particular, delay.
8. Where the alleged breach consists of a last straw which leads the Claimant to resign, this might not always be unreasonable when viewed in isolation, but its essential quality must be that it was an act in a series the cumulative effective of which amounts to a breach of the implied term. Entirely innocuous acts by R cannot be final straws, even if C genuinely but mistakenly interprets an act as hurtful or destructive.

9. If there was a constructive dismissal in this case, as stated above, the dismissal will be unfair. The Respondent had no intention to dismiss and so shows no potentially fair reason for dismissal.

FINDINGS OF FACT ON THE ISSUES

10. I will deal with the allegations in chronological order. The allegation numbers from the list of issues will remain the same for ease of reference.

Allegation 12: The Claimant's October 2018 leave was cancelled as the Respondent had failed to arrange cover although it had been aware of a staff retirement 10 months earlier which created the lack of cover.

11. It is part of the background to this matter that the senior caretaker, Mr Cox, was to retire. The Claimant understood that a promotion was possible. He was asked to defer taking annual leave around the time of Mr Cox's retirement so that caretaker presence was maintained on site. The Claimant was keen to show his dedication. The Claimant did not inform the Facilities Manager, Mr Jones, that he had a holiday arranged with his then girlfriend. The holiday involved meeting his then girlfriend's family. His leave was not cancelled by the Respondent, but rather he agreed to defer leave, with the Respondent unaware that this involved him breaking an arrangement with his then girlfriend. Unfortunately, his girlfriend was unimpressed that the arrangement she had made with the Claimant to meet her family was broken by him, and she ended the relationship.
12. Whilst the matter is unfortunate, as a matter of fact the Respondent did not cancel agreed annual leave. The Claimant agreed to defer with the Respondent unaware of the potential consequences to his relationship.
13. There was no breach of contract committed by the Respondent here.

Allegation 13: the Claimant was not appointed to the vacant position of Estate Manager in 2018.

14. This matter is at the heart of the Claimant's dissatisfaction with the Respondent. The Estate Manager position was created by the Respondent following the retirement of Mr Cox. If the Claimant had secured the position, it would have amounted to a promotion. The Claimant was interviewed for the job. He was unsuccessful. The job was offered to someone else. The Claimant was told that he had come 'a close second'. The person to whom the job was offered, did not take it up. The Respondent re-advertised for the job and did not entertain the Claimant's further application. He was not re-interviewed.
15. The Respondent's position was that the Claimant had neither relevant management experience nor skills. There was also a belief that he had not

always communicated professionally with residents. The Claimant was regarded as good at his job and valued as such. The Respondent did not see him as the manager of the estate, however.

16. Nonetheless, in my Judgment, the Claimant had a legitimate expectation to be reconsidered and re-interviewed having been told he had come 'a close second'. The Respondent's refusal to do that amounted, in my Judgment, to a breach of the implied term of trust and confidence. There was no reasonable cause to refuse reconsidering or re-interviewing him, having told the Claimant he had come a close second.
17. The Claimant establishes a breach of contract for the failure to reconsider and re-interview him for the job. The trouble for the present claim is that the new Estate Manager, Mr Pascoe, was recruited in December 2018. The Claimant did not resign until December 2021, some 3 years' later.
18. Unfortunately, the Claimant never respected Mr Pascoe's position or authority from his appointment onwards. The Claimant thought Mr Pascoe held the job he should have had. That lack of respect for Mr Pascoe's position influenced much of subsequent events.

Allegation 11: the Claimant's face was burnt by a contractor's weed spraying in windy conditions in August 2019. Again, despite him completing an accident report, the issue was not investigated adequately or at all and the Claimant felt completely unsupported.

19. The Claimant alleges that his face came into contact with weed killer sprayed by third party contractors, YGS Landscapes Ltd. He was down wind in windy conditions. The contractors were not the servants or agents of the Respondent. The Claimant alleges that the exposure has led to facial reddening.
20. The Respondent, by Mr Jones, did phone the Claimant to check upon his health. They referred him to the Respondent's health and safety team. The Respondent's insurer was informed and a report was completed by Mr Thompson in October 2019. The Respondent provided records to the Claimant's personal injury lawyers.
21. It was not the Respondent's obligation to sue YGS Landscapes Ltd on the Claimant's behalf. The Claimant engaged personal injury lawyers himself. The claim failed to proceed because an expert dermatologist in Exeter instructed by the Claimant's solicitors failed to confirm that any facial reddening was caused by exposure to the weed killer.
22. The Claimant's disappointment with the outcome of this episode relates principally to the fact that his own personal injury claim did not progress to compensation. That, it seems, was down to the fact that expert opinion did not support causation.

23. The Respondent itself was not in breach of contract.

Allegation 9: the Claimant was provided with a base since 2019 which was a gas meter cupboard in which there had been a sewerage leak and a broken light in Block 9, Quadrant Quay. The problems were not repaired despite having been reported.

24. The Claimant stored materials in this 'cupboard' in Block 9, Quadrant Quay. It seems that he took it upon himself to do so. As a matter of fact, he stopped using the cupboard 'as a base' in May 2021. The allegation was historic as at the time of resignation, therefore.

25. Prior to April 2021, on-site Estate staff were invited to use the electrical 'cupboard' in Cargo 1 as a base. The Claimant chose not to use it.

26. Post April 2021, the idea was that staff would use the facilities in the Quadrant Wharf development. The Claimant chose not to use them, also.

27. The central contention that the Claimant was provided with a wholly inadequate base is not established by the Claimant.

28. The Claimant proves no breach of contract under this allegation.

Allegation 10: the Claimant was required to clean a lift with no alarm call system fitted in the Cargo 2 building. The defect, having been reported by Mr Pascoe on 26 February 2020, remained un-repaired.

29. Mr Pascoe did report the defect on 26 February 2020. A KONE operative attended for an inspection on 4 March 2020. The defect was not repaired during Covid.

30. The defect was to the external call out system. The internal alarm bell was working throughout. It was loud enough to attract the attention of Cargo 2 residents. In addition, the Claimant was provided with an estate walkie-talkie.

31. The manner in which the Claimant accommodated the problem when cleaning the lift, was to clean it on the ground floor and wedge the doors open so that there was no possibility of being inside the lift with doors closed. That, in turn, removed any theoretical possibility of being trapped in the lift.

32. Whilst the defect was not ideal for anyone using that lift in the Cargo 2 building, the fact third party contractors had not mended the defect did not objectively amount to a breach of the implied term of trust and confidence by the Respondent. The Claimant accommodated the defect by his practice of wedging the doors, with no actual risk to his health and safety, if there ever was one in theory.

Allegation 1: the Claimant's work location was changed in May 2021 from having been dedicated to look after Quadrant Quay to a role which covered all of the Respondent's sites at Millbay.

33. When the Claimant started work for the Respondent, he was a caretaker/housekeeper. His place of work, under his contract of employment dated 17 December 2014 was '...Quadrant Quay, Plymouth, although the Company may require you to work at other locations on a temporary or permanent basis'.
34. There is an amendment to terms and conditions of employment dated 12 March 2015 recording a site restructure from 2 to 4 locations.
35. It was understood by all, the Claimant included, that the Respondent was to expand its estate in the Millbay area. Prior to May 2021, the Claimant performed functions beyond Quadrant Wharf, across the whole of the Estate. That included the Cargo 1 and Cargo 2 buildings.
36. He was employed as the 'Estate Caretaker' with responsibilities for the whole estate.
37. Quadrant Wharf opened in May 2021. The Claimant knew that he could be asked to perform functions there as well as other buildings in the estate.
38. The buildings are close together. The furthest distance is between Quadrant Wharf and Cargo 1 buildings. That is a quarter of a mile.
39. There was no breach of contract involved in the addition of responsibilities at Quadrant Wharf over the existing accepted duties at Quadrant Quay, Cargos 1 and 2.

Allegation 2: the Claimant's company mobile phone was taken from him in May 2021.

40. Mr Jones made a decision in May 2021 that only the Estate Manager would hold the company mobile which was the contact number for residents and contractors. The Claimant would hold the phone when covering for Mr Pascoe, as he would when Mr Pascoe was on annual leave. The Claimant and all estate staff were issued with walkie-talkies. The Claimant did have to return the company mobile phone to Mr Pascoe, and clear his personal information from it.
41. Mr Jones' position was that the Respondent wanted one contact number only for residents and contractors and that point of contact should be the Estate Manager. The decision was designed to reinforce Mr Pascoe's role and authority. The Claimant had always struggled to accept that.
42. The Claimant did not actually need the mobile phone for his duties. He told the Tribunal that he might need it for emergencies. He did not need it as a matter of routine. He had the walkie-talkie for emergencies.

43. I understand the Claimant's irritation with having the mobile phone taken from him, however there was reasonable cause for Mr Jones' decision and as such there was no breach of contract in May 2021 in this regard.

Allegation 3: The sign in/out register was moved in the summer of 2021, such that he was required to walk a significant additional distance in order to sign in/out.

44. The sign-in location was moved from Cargo 1 to Quadrant Wharf. The Estate Manager was based at the new Quadrant Wharf building. The idea behind the requirement to sign in at Quadrant Wharf was that would enable the Estate Manager to have visibility of his staff arriving for the day's work. The employee hub was at Quadrant Wharf. It was from there that keys and walkie-talkies would be issued.

45. I agree with the Respondent's submission that Tuesday to Friday there was no reason to prevent the Claimant starting his litter picking duties closer to Quadrant Wharf rather than walking back to Cargo 1.

46. The walk between Cargo 1 and Quadrant Wharf takes 5 minutes. The Claimant told us that he had always 'zig-zagged' between the locations. It was part of the job.

47. Moving the site for signing-in was not objectively onerous on the Claimant. It was innocuous. In any event, there was reasonable cause for moving it. There was no breach of contract.

Allegation 4: His gate fob was taken from him in August 2021.

48. This relates to July 2021. The fob was for the Cargo 1 garage. At the time (see below) the Claimant had abandoned his car in that garage and was not driving it. The Respondent required the Claimant to lend his fob to a resident whilst reprogrammed fobs were being obtained. The resident was using the garage.

49. There was in any event a central fob kept in the Quadrant Wharf office if the garage gates needed to be opened for work duties. The Claimant had access to that. He could perform his job as usual.

50. The Claimant was irritated by the requirement to lend his fob. He believed it was part of wider bullying. Objectively, however, the Respondent had reasonable cause for the instruction.

Allegation 5: the Claimant was required to move 85 waste bins over 4 sites which, he alleges was a 3-man task. The requirement fell on him alone from May 2021.

51. The requirement to move that number of bins was fortnightly when it was waste and also recycling collection. Moving of the bins takes place on a Monday. The Claimant's new timetable provided for this work. The Claimant completed the work in time, save for one occasion when he was 10 minutes late.
52. The bins have wheels. I accept, of course, that bin wheels can become defective occasionally, when they need repair or replacement. The job involves pulling or pushing the bins out of the bin stores to locations where they are processed by waste disposal contractors. Mr Pascoe tells me, and I accept, that the typical distance for this is 10 metres. At Cargo 1 it is 25 metres. It may be a longer distance if there are temporary works going on. Mr Pascoe also tells me, and I accept, that if he is there, he helps with the bins.
53. Whilst I acknowledge it will take time and some degree of physical exertion to move the bins, this work is timetabled proportionately and the work is not unduly heavy in terms of health and safety. It was the Claimant's job to move the bins and he was able to do it. He was given appropriate time to do it.
54. He does not establish a breach of contract under this heading.

Allegation 6: the Claimant's car parking space was altered in August 2021.

55. The Claimant left his car in the Cargo 1 car park. He left it there SWORN, untaxed, not MOT'd and uninsured. The space he left it in was not owned by or let to the Respondent. Mr Pascoe states there were complaints from residents about the apparent abandonment of the car. In July 2021 the Claimant was asked to move it. There was reasonable cause for that request. The Claimant was not entitled to abandon his car there, even if he kept it clean.
56. In the event, the Claimant re-taxed the car again and put it back on the road. He then used the car park as before, even though there was no space allocated to the Respondent. There were one or more spare spaces, however.
57. There is no breach of contract here.

Allegation 7: the Claimant's workplace (block 9 at Quadrant Quay) lacked a lightning conductor.

58. The Claimant says that he became aware that there was no lightning conductor in block 9 at Quadrant Quay in 2019, and reported it. A lightning conductor deals with the conduction of electricity should a building be hit by

lightning. The Respondent says it had repairs done on 11 June 2021. There is an invoice in the bundle. The Claimant says this work was for block 10 not block 9. The Respondent does not accept that.

59. I prefer the Respondent's evidence on this on the balance of probability. It is likely that they know what they paid for. In any event the Claimant did not resign because of the lightning conductor. Further, he affirmed or waived the position, working 2 years following his raising of the matter.

60. There is no actionable breach of contract here.

Allegation 8: Part-time workers were given preferential choices of leave dates over the summer and at Christmas in 2021.

61. The Claimant had 2 weeks leave in August 2021. He did not attempt to book any Christmas leave before giving notice of resignation in November 2021. The part-time cleaners did book their summer 2021 leave prior to the Claimant. However, when they took their leave was immaterial. The Claimant could be off at the same time as a cleaner; he could not be off at the same time as Mr Pascoe, and it was that which needed to be monitored.

62. Mr Pascoe told us he would give the Claimant choice of leave dates over the summer. Mr Jones told us that the Claimant did not raise any issue about a specific period he wanted off in summer 2021. The Claimant was not refused annual leave at any time over summer 2021.

63. It seems that he perceived that the cleaners got preference; but he was wrong about that. All that the Respondent needed to ensure was that Mr Pascoe and the Claimant were not off at the same time.

64. There is no breach of contract proved here.

Allegation 14: In late October 2021/early November 2021 the Claimant was instructed by Mr Pascoe to answer the mobile phone in Mr Pascoe's absence with specific wording as follows – 'Please answer all calls in a business-like manner, for example, Good Morning/Afternoon, Mainstay, Jon speaking'. This was described as degrading by the Claimant.

65. There is no objective justification for the Claimant's view that this was degrading. The instruction, in the form of a note, was reflective of the Respondent's concern that the Claimant did not always communicate in a business-like manner. The instruction itself is innocuous.

66. It amounts neither to a breach of contract nor a last straw.

CONCLUSIONS

67. The Claimant had become disillusioned with the Respondent. He decided it was time to leave. That is a matter for him, of course. I do not criticise him for leaving. The Respondent was disappointed because the Claimant was good at the job he did. To succeed in a claim for constructive unfair dismissal, though, a Claimant has to prove a breach of contract which was not affirmed or waived.
68. The Claimant proves one breach of contract, namely the Respondent's refusal to reconsider and re-interview him for the Estate Manager role in December 2018, when the person first offered the job did not take it up. On that occasion he was told he had come a 'close second'. There was then no reasonable basis for refusing to reconsider and re-interview him having told him he had come close first time round. That failure was bound to demotivate him and cause resentment. Indeed the Claimant resented Mr Pascoe's appointment from then onwards.
69. However, by working for a further three years, the Claimant affirmed or waived the breach of contract. The time to resign – in terms of having a good prospect of establishing a constructive dismissal - was in or around December 2018. Not at the end of 2021.
70. Indeed, even in respect of the matters he complains about in May 2021, which do not in my Judgment amount to one or more breaches of contract, he went on to work for a further 6 months. By doing so he affirmed or waived those matters.
71. The Claimant does not prove any other breach of contract, whether affirmed or not. His claim fails.

Employment Judge Smail
Date 29 April 2023

Written Reasons sent to the parties on 04 May 2023

For the Employment Tribunal