



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Bah

**Respondent:** Atalian Servest Security Limited

**Heard at:** London East Employment Tribunal (by court video platform)

**On:** 31 March 2023

**Before:** Employment Judge Hook

**Representation**

Claimant: In person

Respondent: Mr A Sendall, counsel

**JUDGMENT** having been sent to the parties on 13 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### INTRODUCTION

1. There were a number of claims before the Tribunal in this case. The claimant brought claims for constructive unfair dismissal, notice pay and failure to provide written particulars of employment. These claims were not well founded and were dismissed.
2. The claimant had also brought a claim for holiday pay which he withdrew in the course of the hearing and the respondent brought an employer's contract claim that it withdrew following the Tribunal's decisions on the claimant's claims for unfair dismissal, notice pay and failure to provide written particulars of employment.
3. It is the three claims identified in paragraph 2 above that these written reasons therefore address.

4. I shall set out a brief factual introduction before turning to the law, the issues in the case and then setting out my findings of fact and the evidence on which those findings are based.
5. The claimant was a full-time permanent employee of the respondent. He was employed as a security guard. The respondent provides services, including security services, to a range of clients at different sites. When the matters that gave rise to this claim began, the claimant was deployed at a London hospital. In some of the papers he is described as a “mental health officer”. The parties told me that this signified he has received training that enabled him to work as a security guard at a venue where there are people with mental health issues.
6. In June 2022 a member of the public made a complaint about the claimant. The claimant’s manager posted a copy of this complaint (with the claimant’s name changed) into a staff WhatsApp group. This was prior to him investigating the complaint. The claimant did not like this. He felt people could infer (from the date and time of the incident which was included in the message) that he was the subject of the complaint, the WhatsApp group contained people who were ex-employees and he denied that he had behaved as alleged.
7. The hospital requested that the claimant be removed by the respondent from working at that site. The respondent gave effect to this request and made some efforts to find him another location for work. The respondent continued to pay the claimant in full until October 2022 and honoured his holiday pay. It did not in fact require him to report for work at any locations.
8. The claimant’s case is that he resigned in July 2022 and was constructively dismissed because of the actions of his manager in posting the complaint in the WhatsApp group. There were a series of communications from June to October 2022. The respondent’s case was that the claimant did not resign until October (which is why it stopped paying him then).
9. The claimant engaged with a disciplinary process over several weeks, engaged to an extent with efforts to find a new work location for him and applied for jobs advertised by the respondent. The respondent’s case is that the claimant was not constructively dismissed.
10. The claimant said that he is owed notice pay following his constructive dismissal. The respondent’s case was that no notice pay was due to the claimant as he had resigned freely and, in any case, if he had (as he claimed) resigned in July then he received more than his due notice pay, having been paid in full until October.
11. The claimant said he did not receive written particulars of employment. This was disputed by the respondent.

## THE LAW

### CONSTRUCTIVE DISMISSAL

12. Employment Rights Act sections 95(1)(c) and 136(1)(c) provide that a person is dismissed from their employment when the circumstances are such that they are entitled to terminate it due to the employer's conduct. This type of dismissal is referred to as constructive dismissal.
13. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, it was held that conduct by an employer that leads to a constructive dismissal must involve a repudiatory breach of contract. A claimant bringing a claim for constructive dismissal must establish that there was a fundamental breach of contract by their employer that repudiated the employment contract, that breach caused the employee to resign and the employee resigned without delaying for too long. Delaying for too long would affirm the contract and end any right to claim constructive dismissal.
14. One of the implied terms of employment contracts is a term of mutual trust and confidence, see Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR EAT. In Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606 HL, the House of Lords held that there is a duty on both employer and employee not to conduct themselves, unless there is reasonable and proper cause, in a manner that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.
15. A breach of this implied term will be regarded as repudiating the contract of employment, see Woods v WM Car Services (Peterborough) Ltd 1981 IRC 666, EAT, a decision following the House of Lords consideration of Malik. The Tribunal has to consider whether the conduct of the employer which the employee complains of has a reasonable and proper cause and, if it does not, whether the conduct was calculated or likely to destroy or seriously damage trust and confidence.
16. If it is shown that the employer has breached the implied term of trust and confidence, thereby committing a repudiatory breach of the contract, then the employee must establish that they accepted the repudiation. They must terminate the contract by resigning. The contract is not ended until the employee communicates their resignation to the employer. A resignation may be words or conduct and the Tribunal may need to consider surrounding circumstances to determine whether there was in fact a resignation.
17. The employee must also show that their resignation was caused by the repudiatory breach in question and not by something else. A resignation can have more than one cause. The breach must be an effective cause in the circumstances of the case.
18. As noted above, too long a delay between the breach and resignation may lead the employee being taken as having affirmed the contract. In Western Excavating

(ECC) Ltd v Sharp 1978 ICR 221, CA, the court said the employee “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.”

19. Affirmation is not simply a question of how much time has passed but also what the conduct has been by the employee, see Chindove v William Morrison Supermarkets plc EAT 0201/12, where Langstaff P identified that whether the employee’s conduct has shown an intention to continue in employment or resign is key. In Chindove it was also said that an important factor was whether the employee was at work in the period on question.

#### NOTICE PAY AND HOLIDAY PAY

20. A claim for notice pay arises where an employee has been dismissed and he has not been paid the notice period due to them. In this case the notice pay claim will be directly connected to the constructive dismissal claim. If the claimant was not dismissed (i.e. he resigned but that resignation was not a constructive dismissal) then notice pay will not be due to him.

#### FAILURE TO PROVIDE WRITTEN PARTICULARS

21. Employment Act 2022 s. 38 provides that if the claimant succeeds in a claim listed in Sch 5 of that Act (which would include his constructive dismissal claim) and the respondent is in breach of this duty to provide written particulars of employment under Employment Rights Act 1996 s. 1, then compensation must be awarded.
22. The employee must succeed in his substantive claim and show that he was not in fact provided with written particulars.

#### THE ISSUES

23. Considering the law as outlined above the issues in this case in relation to the constructive dismissal claim are:
  1. Did the respondent do the following things:
    - a. Share the content of a complaint about the claimant, entailing serious allegations, with a broad group of colleagues and others in circumstances where it could be inferred that the complaint was about the claimant and do this prior to investigating the complaint which the claimant denied?
  2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
    - a. 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

b. whether it had reasonable and proper cause for doing so.

3. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
4. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

24. In relation to notice pay the issues are:

1. Was the claimant dismissed?
2. What was the claimant's notice period?
3. Was the claimant paid for that notice period?

25. In relation to the claim for compensation for failure to provide written particulars the issues are:

1. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
2. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
3. Would it be just and equitable to award four weeks' pay?

## EVIDENCE RECEIVED AND FINDINGS OF FACTS

26. The first issue was whether the claimant's manager (an officer of the respondent's company) had acted as alleged by the claimant. The claimant gave evidence in a witness statement. He set the scene by explaining his role, part of which was to check at the hospital door if people had appointment letters, point them in the right direction, check they would comply with a Covid related one-way system and ask them to wear a mask. He said that blood test patients went to different clinics depending on whether they were under or over 16 years of age.
27. He said he was shocked when his manager put a message in the work WhatsApp group chat copying the content a complaint. A screenshot of this was produced on page 58 of the hearing bundle. The complaint was that on 17 June 2022 at 16:50 a security guard called Michael (it was common ground between the parties that the manager had changed the claimant's name to Michael when copying the post). The

screenshot also shows only part of the complaint but it was common ground that the full complaint was replicated in the WhatsApp group. The full complaint is set out in an email on page 60-61.

28. The manager prefaced the message with the words,  

“...any unprofessional behaviour will be dealt with swiftly, the person involved in this complaint will be removed swiftly from the hospital.”
29. The complainant alleged that when she came to the hospital a security guard, the claimant, had called after her and said “I’ve been waiting for you”, asked her name and age and asked “how long will you be?”
30. She said that he then gave his own name and said: “I’ll be waiting for you” followed by “make sure you come and see me afterwards.” She said she took this to be unwanted flirting and it made her uncomfortable. The man appeared to be several decades older than her. She says that this added to her stress at having to attend a hospital.
31. The claimant denies the allegation in the complaint. As I reminded the parties, whether or not that complaint was well founded was not an issue for me to determine.
32. The claimant’s evidence was that the WhatsApp group contained about 40 people including current and former employees. He said that people would know it was him referred to, notwithstanding the name change, because of the time and date being given and the fact that he was moved from the site. People could work out that ‘Michael’ was him.
33. The respondent called evidence from Emma Craig, an HR Business Partner. She accepted that the WhatsApp message had been sent on 24 June 2023 as described by the claimant and that this was prior to investigation being completed. Ms Craig could not provide any evidence regarding who was in the WhatsApp group. She could not say whether the claimant’s evidence was right or wrong about that.
34. There is therefore no real factual dispute between the parties that this message was sent to a WhatsApp group, and the message was the reproduction of a complaint about the claimant. I also accept as correct, on the balance of probabilities, and in the absence of any evidence from the respondent to contradict the claimant, that there were about 40 people in the group including current and former staff and at least some of them could infer that the complaint was about the claimant.
35. The second issue is whether that breached the implied term of trust and confidence. The claimant says he was very upset by this message being sent to this wide group. The matter had not been investigated at that point. His manager,

who had posted the message, did not meet with the claimant to discuss it until 12 July 2022. The wording with which the manager prefaced the complaint implied he had already decided the complaint was true.

36. Miss Craig rightly conceded in her evidence that it “would have been better” for the manager to share it with the security officer concerned rather than with the whole team. The Tribunal was surprised to hear that the manager has not, as far as Miss Craig was aware, received any feedback from the respondent about this.
37. In my view, the claimant’s sense of upset is understandable. He was being accused of sexually harassing a young woman visiting a hospital. He disputed this and found it embarrassing for many people to know about this allegation that he said was unfounded and he felt a sense of unfairness that it had not yet been investigated.
38. I find that on the balance of probabilities the manager’s actions were not calculated to destroy/seriously damage trust and confidence between the parties but were likely to have that effect.
39. I find that the respondent did not have reasonable cause for this action. The respondent could have discussed it with the claimant personally. If there was a business need to urgently remind all staff of how they should behave then that could have been done a) in a way that only went to current staff (not the former staff the claimant says were in the group) b) did not risk the claimant being identified and c) made clear that the complaint was not yet investigated.
40. The third issue is whether the claimant resigned in response to the breach and a connected question is when did he resign?
41. On 14 July 2022, the claimant says. he was told he would be offered a new role at another location. He says in his statement that he went for an induction meeting at another site but waited for two hours and was sent away.
42. On 21 July 2022 his union sent an email to the respondent. The claimant’s case was that this email was his resignation. It is signed by a “legal caseworker” of the union in question. It refers to the complaint against the claimant and the subsequent posting of the WhatsApp message. It says that the manager’s behaviour “completely eroded” the claimant’s trust and confidence in his employer and that this is enough to amount to constructive dismissal. He asks for compensation (a list of seven types of compensation are set out) with a promise that “a detailed list of my remedies will follow”. He says he might issue proceedings in the Employment Tribunal if he does not receive a response by 28 July 2023.
43. The email does not use the word “resign” or an derivative of that word. It does not, in my view, clearly say that the claimant has or is resigning. It is ambiguous. It refers to constructive dismissal but the letter as a whole, without any reference to

resignation, can be read as a suggestion that may arise unless compensation was paid.

44. This email was forwarded within the respondent's HR department and reached Ms Craig. She said in her evidence, "although it referred to constructive dismissal [it] did not appear to make it clear that [the claimant] was treating his employment at an end. We therefore continued to pay [him] and look for alternative roles for him."
45. One of Ms Craig's colleagues was in contact with the claimant around 4 August 2022 about him potentially being posted to location in Sutton. According to an email record Ms Craig's colleague called the claimant about this role and he said he would call her back about it. There is also an additional email from the claimant's former manager at the hospital site that he had contacted the claimant about the Sutton role and received the same message from the claimant (i.e. that he would call him back about it). In my view, the claimant saying the he would get back to the HR department and his manager about a potential posting to Sutton is inconsistent with the claimant believing he had already resigned from the company.
46. The claimant's evidence was that he said he was not interested in the Sutton job as he had left the company and told the respondent's representatives this. On the balance of probabilities, I do not accept the claimant's evidence on this point. If he had said "I am not interested, I am not part of your company any more" that would be noted in the emails reporting the outcome of the calls. Both staff note the claimant saying he would call back which gives the impression of a person who would at least consider the Sutton position.
47. Ms Craig met with the claimant on 18 August 2022 and again on 6 September 2022 and has produced typed notes of these meetings.
48. At the 18 August 2022 meeting the claimant's union representative attended and said that the claimant's position "is that his employment with the company cannot continue." Ms Craig referred to the company's hope to find another location for the claimant to work at. She noted that the claimant was still being paid by the respondent. The parties in the meeting referred to convening a further meeting. Ms Craig said  

"I would be looking to support in retaining (sic) [the claimant] in employment and go through [a] redeployment process."
49. The trade union representative replied, "yes that's fair enough."
50. At the 6 September 2022 meeting, the parties appear to have kept stating that the claimant had, or had not, resigned. The respondent's representatives raised a number of redeployment options for the claimant. The claimant appears to have made clear he was not interested in those roles.



51. The claimant emailed Miss Craig on 25 October 2022 reiterating his claim to have resigned via his trade union representative's email of 21 July which "I confirmed to you in person at our meeting of 6 September 2022." The subject line was "resignation" and the company treated this as a resignation.
52. It is clear that the claimant did resign at some point. In my view, the 21 July 2022 letter was ambiguous, not using the word resignation. Ms Craig read it as an expression of unhappiness and a threat to raise constructive dismissal and claim compensation rather than as a resignation. In my view, that was a reasonable way to read it and if the claimant had intended to resign and intended the respondent would understand him to have resigned he (or the person writing on his behalf) would have used that term.
53. Considering the records of the meetings, which I have summarised, it was clear by the 6 September 2022 meeting that the claimant intended to resign and the respondent should have clearly understood it by that point. Therefore, I find that the claimant effectively resigned on 6 September 2022.
54. The manager's handling of the complaint, which I have found was a breach of the implied term of mutual trust and confidence, was clearly an effective reason for the claimant's resignation. He referred to it as the reason.
55. I now turn to the question of whether there was affirmation of the contract. The matter of delay is important. On the claimant's case he delayed by almost a month from the breach of the contract (the posting of the WhatsApp message) to submit his resignation. There was no good explanation offered by the claimant for that delay.
56. In cross-examination he said he went to the Euston site regarding the possibility of working there (on or about 15 July 2022) "to see what the company was up to." In my view, the most likely explanation for his attendance was that he was interested in being redeployed there and was open to still working for the company.
57. In paragraph 17 of this witness statement the claimant appears to suggest that he delayed his resignation to wait for the outcome of the respondent's investigation into the complaint against him but if he had, as he claimed in evidence, already irretrievably lost confidence in the company due to the WhatsApp such that he needed to resign then it is unclear how that could be changed by delay at that stage.
58. It was common ground between the parties that the claimant had engaged in a disciplinary process after the complaint about him and had attended two disciplinary meetings on 7 July and 14 July 2022 which led to him being informed that no disciplinary sanction would be imposed except his transfer to another site requested by the hospital.

59. I have found, as indicated above, that he delayed his clear and effective resignation until 6 September 2022, roughly two and a half months after the incident giving rise to these matters.
60. The conduct of the claimant in that time is important. He went to the meeting at Euston regarding working at the that site in mid-July. In early August, regarding deployment at Sutton he said he would call back (see my finding on that further above).
61. Thirdly, there is evidence that he was applying for roles with the respondent company. The respondent produced in evidence a record from the jobs website Indeed that the claimant on 26 July 2022 applied for a job (as if applying as an external candidate) with the respondent. The claimant suggested he may not have known this job was with the respondent company, but the respondent also produced in evidence a screenshot of how its jobs advertised on Indeed appear to people using that site. The respondent's company name and logo are clearly visible. I am satisfied on the balance of probabilities that on 26 July 2022 the claimant applied for a job with the respondent and knew he was doing so.
62. There is a further record from the Indeed website of the claimant applying for another role with the respondent on 9 October 2022. This was after his resignation but I note it as an odd step to take for someone who purports to have resigned because of mistreatment by the respondent and I give it weight as indicative of what his attitude to the company had been in the months prior. It is indicative that he was still willing, or prepared to indicated a willingness to work for the respondent.
63. He accepted pay throughout this period. He does not appear to have queried his pay in August but in fairness to the claimant did email the respondent in September to say he assumed his pay was part of his "severance package." That was arguably an odd thing to say as although his representatives had demanded compensation, the respondent had not made any admission of liability or suggestion that it would pay him a "severance package". I have no doubt it would have been clear to him that the ongoing payments reflected his normal monthly pay.
64. I am satisfied that the claimant's words and action taken together show he chose to keep the contract alive and he affirmed it before resigning. He did so by the following actions, taken together:
  - a. The delay in his resignation;
  - b. His engagement with the disciplinary process in July;
  - c. His acceptance of pay, especially in August when he did not query being made his normal wages;
  - d. His active engagement with potential redeployment at Euston in July;

- e. His apparent entertaining of possible redeployment at Sutton in August; and
  - f. His application through an external website for a role with the respondent on 26 July 2022.
65. The overall picture that is created by the claimant's conduct is someone who was trying for a period of time to have it both ways. On the one hand he began, from 21 July 2022, to raise the threat of a claim for constructive dismissal and sought compensation. On the other hand, he took the actions listed above which suggest he was still open to working for the respondent.
66. I noted above in setting out the law that affirmation is not simply a question of how much time has passed between the breach of contract and resignation but also what the conduct has been of the employee, and in Chindove, Langstaff P identified the importance of whether the employee's conduct has shown an intention to continue in employment. Throughout the period of delay the claimant, did in my judgment, indicate an intention to continue by the steps I have referred to above.
67. I am satisfied that the claimant affirmed the contract and was not constructively dismissed.
68. Turning to the notice pay, it follows from my analysis above of the evidence that the claimant was not dismissed. In addition, I note that he was paid up until 1 October 2022, after his resignation in any event. The claimant's contract of employment says that his notice period would be two weeks plus one week for every year of service beyond two years. His contract of employment was dated March 2018, so he had been there for four full years when his employment came to an end. Even if notice pay had been due, he had been paid beyond his effective resignation on 6 September 2022 for about four weeks in any case.
69. In evidence I was shown his contract of employment at pages 37-38 of the bundle with a variation to the terms on pages 39-40. In cross-examination the claimant was unclear whether he accepted that these had been provided to him. His witness statement had not addressed the issue.
70. I am satisfied that the claimant was provided with these documents and therefore was provided with written particulars of this employment.

## CONCLUSION

71. For the reasons I have set out above the claimant's claim for constructive dismissal is not well founded. It is clear that the claimant by his conduct affirmed his employment and he cannot properly claim to have been constructively dismissed.

72. The claimant's claim for notice is not well founded given he was not dismissed and I have made the observation that he was paid beyond his eventual resignation in any event to an amount roughly similar to the notice pay that would have been due had he been dismissed.
73. The claimant's claim for a failure to provide him with written particulars is not well founded. I have found that written particulars were provided, namely the contract and other documents provided in the hearing bundle.

**Employment Judge Hook**  
**Date: 20 June 2023**