



EMPLOYMENT TRIBUNALS

Claimant
Mr Sajid Ali

V

Respondent
H B Pizza Ltd
(In Creditors Voluntary Liquidation)

Heard at: Leeds (via CVP)

On: 08 September 2023

Before: Employment Judge R S Drake

Appearances

For the Claimant: In Person
For the Respondent: No attendance

JUDGMENT

1. The Tribunal finds that the Claimant was not dismissed either expressly or impliedly/constructively as defined by Section 95(1) of the Employment Rights Act 1996 (“ERA”) for the purposes of his claim under Section 94 ERA. He resigned on 16 February 2023. Further it finds that all actions (being called to and undergoing disciplinary procedure) complained of postdating the date of his resignation have no bearing on his resignation as such.
2. Therefore, the claim of unfair dismissal fails and is dismissed. The effective date of termination of employment (by the Claimant’s voluntary resignation as I find it to be 16 February 2023.

REASONS

The Claim

1. The Claimant (“C”) was not legally represented. Therefore, I took special care to ensure that the parties’ representations of their respective cases, the questions

necessarily to be asked by me, and C's understanding of the complex CVP procedure were, I hope, fostered by my assistance and intervention when necessary. I gave brief Reasons when expressing my Judgment orally, but these written Reasons take precedence.

2. I had C's ET1 and his written statement. Also, I had the Respondent's ("R") ET3. I examined what little evidence was provided by C himself, and noted that this was limited to his ET1, his witness statement, and a transcript of a disciplinary meeting which took place on 17 February 2023. There was absolutely no other evidence before me to confirm or support C's main arguments despite the Tribunal's Directions dated 19 May 2023 requiring mutual evidence and document disclosure by both parties; I note that neither had complied.

3. I also noted the following:-

3.1 The onus of proof of dismissal in relation to the unchallenged resignation by C rested principally on him to establish that this amounted to constructive dismissal;

3.2 What occurred after 26 February could become academic if I could not find that the resignation was effective so as to bring employment to an end;

3.3 R had filed an ET3 on 16 June 2023 and had been represented by solicitors upto 24 July 2023, but thereafter they confirmed their instructions were terminated, and that R was progressing into Creditors' Voluntary Liquidation which eventually occurred by Resolution dated 31 August 2023; They did not attend or take any part in this hearing, but as the initial burden of proof rested with C, he could not successfully argue he was entitled to a default decision in his favour.

4. I had before me the claims which are as follows:-

4.1 The Claimant (an Area manager) was engaged by R which is a fast food franchise operator and owns premises throughout the UK but principally for the purposes of the present proceedings, in Harrogate. C complains of unfair dismissal in that he says he was either constructively dismissed and forced to resign on 16 February 2023, in circumstances in which, if I found he had resigned, he was entitled to do so without giving notice because of the Respondent's conduct; OR he asserts he was expressly dismissed later on 17 February 2023 because of alleged gross misconduct which he denies. In support of his constructive dismissal claim he cites the following allegations against the Respondents: -

4.1.1 In early August 2021, he and other colleagues had cause to raise a grievance about the behaviours generally and towards them of a more senior manager a Mr Shabbir; Though R had cause Mr Shabbir to apologise, a few weeks later his behaviour reverted and by 20 October 2021 it was back to what it was before the grievance;

- 4.1.2 Between October 2021 and December 2022 there were a number of instances of ongoing cause for concern about Mr Shabbir's behaviours, but none were specified in any more particularised pleadings nor were they supported by clear supporting documentary evidence; In either case, C had not resigned promptly in response;
- 4.1.3 In February 2023, C again raised a grievance about Mr Shabbir's behaviours, but took exception to investigation of them being undertaken by another of R's employees who was junior to Mr Shabbir and c also disagreed with R's decision not to uphold his grievance; he says he resigned in response to this which amounts to the last straw as far as he was concerned;
- 4.1.4 C pleads without particularity not supporting evidence that he faced bullying and harassment, though he accepts that the latter was not caused by or related to a "protected characteristics so defined under the Equality Act 2010 ("EqA");
- 4.1.5 Lastly, C pleads that he was unfairly dismissed following a disciplinary hearing which took place during his notice period on 17 February 2023 which R should not have required him to attend because he had already resigned, but which he attended anyway; He argues that R's purported dismissal of him on grounds of alleged gross misconduct was both substantively and procedurally unfair;

4.2R, though not present today, had served, and filed an ET3 in some detail on 16 June 2023; I was obliged to take its content into account;

4.3 In terms, R contends that:-

- 4.3.1 C had resigned and was not justified in doing so, but in any event gave notice, so his resignation was not summary;
- 4.3.2 They believed they had cause to call C to a disciplinary meeting at which they felt justified in dismissing him summarily for alleged gross misconduct in not preventing staff at the Harrogate outlet from using the upper floor of the premises for domestic purposes as unlicensed occupiers;
- 4.3.3 They deny that anything done before 16 February 2023 to repudiatory breach by them but that in any event resignation was not prompt after the events of 2021, nothing was sufficiently pleaded to show breaches thereafter, and that the way they dealt with the December 2022 to February 2023 grievance procedure was reasonable and fair and was not an instance of fundamental breach of contract with C;

- 4.3.4 Further, that if C can demonstrate that any event there had been a “last straw” as described by him, they deny that it was sufficiently serious to revive any earlier breaches, and in particular that the Claimant’s resignation was not in response to the alleged breach or breaches but was because he had been called to a disciplinary meeting to investigate possible gross misconduct;
- 4.3.5 If they did dismiss C, they were entitled to do so for a potentially fair reason having found him guilty by his own admission of facts capable of being treated objectively as gross misconduct and that summary dismissal was a fair and reasonable response in all the circumstances;

The Issues

- 5. R’s primary and main assertion is that C resigned and was not dismissed and is therefore not entitled to claim either unfair (or wrongful) dismissal; this, with the above claims, serve to identify the issues which C necessarily had to establish, as the onus rested with him: -
 - 5.1 Did R do the things complained of in paragraphs 4.1.1 to 4.1.5 above?
 - 5.2 Did those things amount to breach(es) of the implied term of trust and confidence? Thus, we concluded it would be necessary to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the necessary trust and confidence between the parties, and/or it had reasonable and proper cause for doing so;
 - 5.3 Was any breach, individually and/or cumulatively, a breach which was fundamental? We recognised it would be necessary for us to determine whether any established breach was so serious that the Claimant was entitled to treat the contract as being at an end;
 - 5.4 What was the effective cause of resignation if not the alleged breaches?

The Applicable Law

- 6. I set out passages from statute and case law relevant to the issues in this case leaving out extracts which are not.

Section 95(1) of the Employment Rights Act 1996 (“ERA”) provides that: -

“For the purposes of this part of this Act, an employee is dismissed by his employer only if

- (a) the contract under which she is employed is terminated by the employer (whether with or without notice) ... (*my emphasis – this is not argued in this case*)
- (b) ...
- (c) The employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer’s conduct ...” (*again my emphasis*)

7. Section 95 (or its predecessor in identical statutory enactment – Section 57 EPCA 1978) is elaborated and explained by the legally well-known decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held 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/herself as discharged from any further performance. If he/she does so, then he/she terminates the contract by reason of the employer’s conduct and he/she is constructively dismissed” (*my emphases*)

This case is also authority for the proposition that the breach must be the DIRECT and PRINCIPAL cause of the resignation, AND resignation must be timely i.e. prompt in relation to the timing of the event complained of.

7. By reason of my findings below, I am not setting out the full content of **Section 98** ERA since it is unnecessary to do so unless dismissal were or had been proved.
8. The Court of Appeal held in the case of **Sothorn v Franks Charlesly & Co [1981] IRLR 278** that sometimes there may be a dispute as to whether the words used by an employer (or by an employee in the case of resignation) in fact amount to a dismissal (or resignation respectively). Where those words are ambiguous, the Court or Tribunal is to determine how they would have been understood by a reasonable listener in the circumstances. This is an objective test. By contrast, if the words used are unambiguous, then their interpretation is to be judged by understanding the way they were actually understood by the party hearing those words. Thus, this is a subjective test. This approach has been applied on many occasions since and more recently in the cases of **Kwik-Fit Ltd v Lineham [1992] ICR 183** and **Willoughby v CF Capital [2011] IRLR 985**.
9. Further guidance is set out in the Court of Appeal decision of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** at para 55 which advises the posing of the following questions:-

- (1) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his resignation?
- (2) Has he affirmed the contract since that act?
- (3) If not was that act or omission by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a remain repudiatory breach of the implied term of trust and confidence?
- (5) Did the employee resign in response to that breach?"

I refer below to the EAT's decision in **Omilaju v Waltham Forest [2005] CA ICR 481**, (which is cited with approval in **Kaur,**) in which Underhill J presiding said:-

"In short, I believe that the Judge was right to find as he did that what occurred in this case was the following through in perfectly proper fashion on the face of the papers of a disciplinary process such a process properly followed, or its outcome cannot constitute a repudiatory breach of contract or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong, but the test is objective, and a fair disciplinary process cannot viewed objectively destroy or seriously damaged the relationship of trust and confidence between employer and employee" (*my emphases again*)

I regard this approach as appropriate when looking at the less confrontational process inherent in a Grievance Procedure and so I take this passage as analogous guidance when examining conduct of such procedure.

Findings of Facts

10. I find that C gave his evidence to me sincerely and in the genuine belief he was being truthful. Despite me giving him opportunity to modify or explain certain key admissions better to his advantage, C stuck to his version of events. There was little or no conflict of evidence apparent in relation to most of, but unfortunately not all, the key issues as identified above, those issues being the interpretation to be put on provable events.
11. The standard required to be met by the Claimant was that of a "balance of probabilities," but I have to say I find that much of his interpretation and his explanation of events is marked by his subjective view of them, whereas I must judge them and the evidence on the basis of objectivity where, as in this case, there was obvious ambiguity. How would a reasonable bystander interpret them is the key question. Where there were material conflicts of evidence, as indicated below and for the reasons set out, I prefer the version of events we describe below.

12. C was limited and my scope for finding in his favour was much damaged by an absence of written records of events preceding resignation. I find the following facts, based on what I could reasonably infer from C's statement and his responses to my questions, as well as the pleadings: -

12.1 C had worked for R (or their predecessors) since the 15 April 2015 and eventually rose to the position of area manager;

12.2 There existed a reasonably cordial relationship between C and the rest of R's management team, but there was an apparent breakdown in relationship with C's immediate superior Mr Shabbir which is evidenced by a grievance being raised by C and others against Mr Shabbir in early August 2021;

12.3 The grievance amounted to a number of complaints about Mr Shabbir's tone and attitude in dealing with his subordinates which caused C and his colleagues considerable concern; C accepts that R investigated these concerns and at C's request caused Mr Shabbir to apologise for his behaviours and agree to modify them in future; Unfortunately he reverted to type some six weeks later from about 20 October 2021, though in the meantime R had responded positively to C's grievance and c had not resigned;

12.4 On 20 October 2021 C and Mr Shabbir visited R's Durham store at which time C complains that Mr Shabbir subjected the manager there (though not C himself) to humiliating behaviour; C did not resign in response to this;

12.4 Thereafter, C says that there were numerous other instances of bad behaviour by Mr Shabbir, but there is no evidence to support this or corroborate what C says, so therefore I can make no finding to confirm his assertion;

12.5 In late December 2022 C raised a further grievance about Mr Shabbir to a colleague Mr Joe Langton who is technically subordinate to Mr Shabbir but who was charged by R with the task of investigating the complaints made by C; again I have little or no evidence before me to support C's assertions about this but I can accept that he took exception to Mr Langton being charged with the task of investigating his concerns on the basis that he was subordinate to Mr Shabbir;

12.6 R eventually in early February 2023 concluded that C's complaints about Mr Shabbir did not give rise to a finding of a valid grievance;

12.7 C took this as the last straw and that he could not tolerate the fact that his complaint had been investigated by Mr Langton and that his grievance had not been successful; Therefore C resigned by sending an e-mail at 12:45 on Thursday 16 February 2023 confirming a phone call of that same date to him telling him that his grievance had been unsuccessful; Later that same day he was sent an e-mail requiring him to attend a disciplinary meeting on the following day to answer allegations that as area manager he had been responsible for allowing staff to use the upper floor of the Harrogate premises for domestic purposes contrary to it being known and instructed in the past that this was not to happen;

12.8 C took exception to this as he was very firm of the view that he had already resigned and could not be required to attend a disciplinary hearing, yet he did so I was told that he was being dismissed for gross misconduct, despite R being aware that he had already resigned.

Application of Law and Conclusions

- 13 Starting with the main issues as identified in paragraph 4 above, I make the following findings applying the law to the facts.
14. Starting with the interpretation of words said and action committed on 15 November and applying the **Sothorn** principles (as approved in **Kwik-Fit** and **Willoughby**)
 - 14.1 The words used as we find in paragraphs 11.7 above are not ambiguous;
 - 14.2 By his own actions, C resigned unambiguously, though he believed for good cause.
15. Moving on to the **Kaur** guidelines to interpretation of Section 95 (1)(c) ERA, we make the following findings applying them to the facts as found above:
 - 15.1 The acts complained of in 2021 did not give rise to immediate or prompt resignation and by remaining in R's employment, c accepted the outcome of the grievance raised at that time, so it cannot be regarded as a breach of contract, or if it could then it was affirmed; This was not a breach of contract nor repudiatory action but quite the opposite;
 - 15.2 The assertions of what happened generally and without evidence or particularity between October 2021 and December 2022 are not a sufficient basis for showing C has established fundamental breach of contract by R; Furthermore, they did not give rise to evidenced complaint nor of resignation in response;
 - 15.3 It is apparent that C did not resign in response to anything save the way of conduct of or and the outcome of his final grievance which was communicated on the day he resigned;
 - 15.4 The ACAS Code of Practice (Disciplinary and Grievance Procedures) 2020 does not expressly or impliedly prescribe that the person investigating a grievance should be senior to the person about whom the grievance is raised and though it advocates prompt dealing with grievances and of making known final outcomes, it does not mean that if C does not like the outcome, this impeaches the grievance procedure as such;
 - 15.4 Applying the **Kaur** and **Omilaju** principles, it is clear that what I can only find that the events prior to the final grievance area not enough of themselves and cumulatively to justify concluding objectively that R has no intention of being bound by its duty of trust and confidence, and nothing about the last grievance is sufficiently serious of itself or seen with anything earlier to enable a finding of fundamental breach, no matter how distasteful C regards the final grievance outcome; It simply was not what he had hoped for but that does not make it fundamental breach.;
 - 15.5 I considered the test in **Western Excavating** and in particular whether C had established the key test emphasised by me by the underlined passages

in that Judgment quoted above. Were there “significant breaches going to the root of the contract of employment, or which show 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/herself as discharged from any further performance. I find that on the basis of the above conclusions, the Respondent did not cause irretrievable breakdown of trust and confidence between the parties;

16. However, it is clear that as I have found the Claimant was prepared to give notice and/or work it as is evidenced by him agreeing to attend the disciplinary meeting 17 February 2023. What actually happened on that date already postdated a clear resignation, so is not relevant to the question of whether C can show he was justified in resigning without notice on 16 February. If he had not resigned so clearly, then I might have had to examine whether the summary dismissal of him next day was for a fair reason and fairly done, but I could not go that far given the finding of resignation.
17. With regard to the issues identified in paragraph 4 above, our findings are:-
 - 17.1 R did not do the things complained of above in a manner calculated to undermine trust and confidence and/or C has not shown that their explanations for such actions are not satisfactory or are unreasonable;
 - 17.2 Nothing R did do amounted to breach of the implied term of trust and confidence; I conclude R did not behave in a way that was calculated or likely to destroy or seriously damaged the necessary trust and confidence between the parties;
 - 17.3 None of the specific complaints amount sufficiently to breach, individually and/or cumulatively; In any event, C accepted at the start that the only but key focus of his claim was the conduct and outcome of the last grievance; C has not established as breach of so serious nature that he was entitled to treat the contract as being at an end;
 - 17.4 The effective cause of resignation was not the alleged breaches, but the objections to the way of conduct of and the outcome of the last grievance;
- 18 Accordingly, I cannot find that C has established that R committed fundamental breach or breach of fundamental terms of the contract of employment so as to enable him to show that he resigned in circumstances in which she was entitled to resign without notice and thus come within Section 95(1)(c) ERA.
- 19 He was therefore not constructively dismissed for, in respect of each complaint and/or cumulatively, for the purposes of Sections 95 and 98 ERA.

- 20 I am satisfied that C's claim must be dismissed and that an absence of evidence does not help his case and is instrumental in my analysis.

Employment Judge R S Drake

Signed 08 September 2023