



EMPLOYMENT TRIBUNALS

Claimant: Mr G Normile

Respondent: Let's Go Green Cabs Ltd

Heard at: London South, by video

On: 23 October 2023

Before: Employment Judge G Cawthray

Representation

Claimant: In person, not legally qualified

Respondent: Mr. N Childs, Managing Director – not legally qualified, Mr K Gorman, Director - not legally qualified

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed in accordance with section 95 of the Employment Rights Act 1996.
2. When the proceedings were begun the Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is not just and equitable to make an award of an amount equal to four weeks' gross pay. In accordance with section 38 Employment Act 2002 the Respondent shall therefore pay the Claimant the sum equal to two weeks' gross pay.

REASONS

Issues

1. At the start of the hearing today we discussed the basis of the claim. The Claimant confirmed that he was bringing a constructive unfair dismissal complaint. The Claimant also clarified the alleged breaches of the implied term of trust and confidence relied upon.

2. The issues are set out below.

Constructive unfair dismissal

3. Was the Claimant dismissed?

4. Did the Respondent do the following things:

- a. Tell Claimant that his wages were too high, and he would need to go on the road as a self-employed taxi driver;
- b. Fail to inform the Claimant of any performance concerns and fail to warn the Claimant of any consequences associated with poor performance;
- c. Serve the Claimant with notice of three weeks and require him to work as a taxi driver during his notice period;
- d. Tell the Claimant that his notice period would be extended, and this caused further stress;
- e. Act in such a way to cause stress.

5. 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.
- c. 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.
- d. 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.

Remedy for unfair dismissal

6. Does the Claimant wish to be reinstated to their previous employment?

7. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

8. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

9. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
10. What should the terms of the re-engagement order be?
11. If there is a compensatory award, how much should it be? The Tribunal will decide:
- a. What financial losses has the dismissal caused the Claimant?
 - b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c. If not, for what period of loss should the Claimant be compensated?
 - d. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e. If so, should the Claimant's compensation be reduced? By how much?
 - f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - g. Did the respondent or the Claimant unreasonably fail to comply with it?
 - h. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
 - i. If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
 - j. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
 - k. Does the statutory cap of fifty-two weeks' pay apply?
 - l. What basic award is payable to the Claimant, if any?
 - i. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Schedule 5 Employment Act 2002

12. Throughout the course of the hearing, it became apparent, and was accepted by the Respondent that no contract of employment had been provided. Accordingly, even though not discussed as an issue at the outset, it was incumbent on me to consider the issues below.

- a. 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?
- b. 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.
- c. Would it be just and equitable to award four weeks' pay?

Evidence and Procedure

13. At the start of the hearing I discussed reasonable adjustments with the parties, and it was confirmed that no adjustments were required.
14. I also explained the process of giving and challenging evidence and the process of submissions. I explained that if either party did not agree with any content in the witness statement or any documentary evidence, then it must be challenged by asking questions in cross examination. I explained that giving submissions, summing up the case, was not a stage at which evidence could be introduced. I reminded the parties of the process several times during the course of the hearing.
15. The parties had agreed a Bundle of 31 pages. I explained that the Bundle would not be read from start to finish and it was for the parties to direct me to any particular document.
16. The Claimant had provided a recording of the meeting on 22 March 2023. To start with, Mr. Gorman said that the contents of the recording were not disputed and said the Claimant had referenced some of the comments in his witness statement. Upon further discussion it became clear that the Respondent did actually seek to challenge the Claimant's interpretation of what was said. Although the recording had been provided, and appeared to be playing, I could not hear any audio. When it became clear that it was necessary to hear the recording, and after discussion with the parties, it was agreed that the Claimant would play the recording, that I could listen to in the presence of the parties. The recording is approximately 25 minutes long, but it took over an hour to listen to as it was necessary to replay sections. It was not possible to hear all what was said. Due to the poor quality, and lack of transcript, I explained to the parties that I would note down the key points but that note would not be verbatim and they were both were required to flag any key parts for my attention and clarify inaudible sections as far as possible.
17. The Claimant had provided a written witness statement. He affirmed and answered questions from both Mr. Gorman and Mr. Childs. I also asked some questions.
18. Both Mr. Childs and Mr. Gorman had provided a written witness statement. They both affirmed and answered questions from the Claimant and myself.

19. Both parties gave oral submissions.
20. Submissions were not completed until almost 2.50pm. I explained that time had been lost due to the listening of the audio recording that I did not consider there to be sufficient time to make findings of fact, apply the law and give my conclusions orally.
21. I explained that I would make a decision on liability, and that my decision and reasons would be sent to the parties in writing, and that if the claim was decided in the Claimant's favour, a separate remedy hearing would be scheduled.

Findings of Fact

22. The Claimant originally worked for the Respondent as a self-employed taxi driver from March 2017.
23. From September 2019 the Claimant moved into office to assist with managing the business. He became an employee and at the date of termination he was paid a salary of £36,400 per year.
24. During this period, until 14 March 2023, the Claimant also undertook some driving for the Respondent. As part of his employment he would drive on school runs as and when required – usually a couple of times a week, and would also do additional driving outside his employed role on Friday and Saturday evenings to earn extra money, there was no obligation on the Claimant to do this.
25. The Claimant did not find driving stressful.
26. Around February/March 2022, Jack Childs, started working in the office alongside the Claimant. No clear information about Jack's role, or how he was supposed to work alongside him, was given to the Claimant. Jack Childs is the son of Nick Childs, Managing Director.
27. The Claimant asked for a pay rise, and was given a pay rise a year or so before his employment ended. At the time Nick Childs told him he needed to pull his weight but the Claimant was not given any clear details or instructions on what this meant.
28. At no time was the Claimant given him any verbal or written warning about his performance. There is no documentary evidence of any discussions about performance. The Respondent does not have a performance management policy and no annual appraisals were undertaken.
29. The Respondent says it had concerns about the Claimant's performance and addressed the concerns by way of general informal chats.
30. In cross examination of the Claimant the Respondent made reference to a couple of matters, in particular vehicles being cleaned and checked, organizing drivers and shifts, calling Mr. Childs whilst he was on holiday,

addressing matters with controllers and giving instructions to Jack Childs. However there was no specific detail of any concerns in the Respondent's witness statements or ET3. For completeness, Mr. Child's witness statement, at paragraphs 6 and 7 states:

"6. There were many time Gary was spoken to about being more productive within his role as office management, making sure cars were cleaned and roadworthy, and going on the road to cover jobs that were backing up etc.

7. I had several conversations with Gary, even increasing his money and telling him he needed to be more productive and improve his performance, including trying to find new drivers and promote the business. These conversations were generally informal chats and meetings at work."

31. There was no formal performance improvement plan put in place. The Claimant was not given any clear targets or improvement goals.
32. The Claimant was not given any warning about what may happen if his performance did not improve.
33. Although there may have been regular discussions about daily tasks and work, it was not clearly explained to the Claimant that there were concerns about his performance.
34. The Claimant was diagnosed diabetes shortly before his employment ended. Mr. Childs accepted that he was aware that the Claimant had been struggling with his health for approximately a year before his employment ended.
35. Keith Gorman and Nick Childs made the decision to dismiss the Claimant. They say the dismissal was due to the Claimant's performance.
36. The Claimant says on 14 March 2023 he, and Jack Childs, were told that the wage bill was too high and if he wished to remain at the Respondent they would need to move to a self-employed role as a driver. The Respondent did not challenge this, and it is accepted this was said.
37. The Claimant asked for this to be set out in writing.
38. The Respondent gave the Claimant a letter on 18 March 2023 which simply stated his employment would end on 5 April 2023. The letter does not set out the reason for employment being terminated. The letter states the Claimant was offered a job as a taxi driver but that was declined. It further states that as of 21 March 2023 the Claimant was required to work as a taxi driver and pay all money earned into the Respondent.
39. The Claimant started working as a driver as instructed during his notice period. Jack Childs remained working in the office.
40. The Claimant felt humiliated.

41. The Claimant had queried the notice period given and whether he should receive a redundancy payment. On 22 March 2023 a meeting took place between the Claimant and Mr. Gorman and Mr. Childs.
42. The Claimant recorded the meeting, but did not tell Mr. Gorman or Mr. Childs that he was recording.
43. The information given to the Claimant during the meeting was not entirely clear, but the key points were:
 - a. That he was not being made redundant;
 - b. That he was being laid off for poor performance;
 - c. That the management job wasn't there or wasn't being done;
 - d. It was acknowledged that the Claimant had bent over backwards for the Respondent, but Mr. Gorman added not recently;
 - e. That his notice period would be extended, during which he would be paid his salary but would be required to drive.
 - f. The extended notice period, until 11 May 2023, was gesture of good will;
 - g. The extended notice would enable the Claimant to earn the equivalent of a redundancy payment;
 - h. That he would not be paid a redundancy payment;
 - i. That he didn't have to work his notice and could leave;
 - j. That could remain at the Respondent, after his notice period, as a self-employed driver and work one day in the office.
44. On or around 23 March 2023, following the meeting, the Respondent provided the Claimant with a further letter. The letter referred to extending the notice period and also stated that the Claimant was *"being asked to leave due to underperforming over the last year."*
45. The Claimant found the situation stressful and was very upset by how he had been treated.
46. The Claimant handed in his letter of resignation 27 March 2023, he referenced giving one weeks' notice.
47. The Claimant attended his GP on 29 March 2023. The Claimant was signed off sick.
48. He was paid for one weeks' notice and holiday pay on 3 April 2023. The Claimant's employment ended on 3 April 2023.
49. The Claimant started working as a Driver at Cab-It on 3 April 2023.

Law

Constructive Dismissal

50. The right not to be unfairly dismissed is set out at section 94 of the Employment Rights Act 1996 (ERA).

51. Section 95 ERA defines the circumstances in which a person is dismissed as including where:

“(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.”

52. That is known as constructive dismissal. The leading explanation of when those circumstances arise was given by Lord Denning in *Western Excavating (ECC) Ltd v Sharpe* 1978 ICR 221: *“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 employers conduct. He is constructively dismissed.”*

53. The Tribunal, when looking at an alleged breach of contract, must look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it - *Browne – Wilkinson J* in *Woods v W M Car Services (Peterborough) Ltd* [1981] IRLR 347).

54. Where there is a complaint of constructive dismissal, the burden is on the employee to prove the following:

- a. That there was a fundamental breach of contract on the part of the employer;
- b. That the employer's breach caused the employee to resign;
- c. The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

55. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal. However, a contractual term often relied upon in cases such as this is that which is described as the implied term of mutual trust and confidence.

56. The leading authority on this implied term is the House of Lords decision in *Malik v Bank of Credit and Commerce International AS* [1997] IRLR 462. In this case Lord Steyn adopted the definition which originated in *Woods v W M Car Services (Peterborough) Ltd* namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

57. It noted that a breach of trust and confidence has two limbs: the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and there be no reasonable or proper cause for the conduct.

58. The test is objective. As set out by Lord Steyn in *Malik*: *“The motives of the employer cannot be determinative or even relevant.... If conduct objectively considered is likely to destroy or serious damage the*

relationship between employer and employee, a breach of the implied obligation may arise.”

59. Reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement (see *Bournemouth University v Buckland* [2010] ICR 908 at para 28).
60. In addition, it is clear from *Leeds Dental Team v Rose* [2014] IRLR8 that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee.
61. Individual actions taken by an employer which do not in themselves constitute a fundamental breach of any contractual term may have the cumulative effect of undermining trust and confidence, and in such a case, the employee is entitled to resign and claim constructive dismissal. This is referred to as “the last straw” (*Lewis v Motorworld Garages Ltd* [1985] IRLR 465).
62. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?
63. The last straw itself does not need to be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, (*London Borough of Waltham Forrest v Omilaju* [2005] IRLR 35). However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.
64. The final straw should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts but it must contribute something to that breach, although what it adds may be relatively insignificant.
65. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju*. The authorities give comprehensive guidance on the “last straw” doctrine.
66. The employee must prove that an effective cause of his resignation was the employers’ fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, the breach must have played a part (see *Nottingham County Council v Miekell* [2005] ICR 1 and *Wright v North Ayrshire Council* UKEAT/0017/13). 59. In *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908 the Court of Appeal held that a repudiatory breach cannot be unilaterally cured by the party in default. However, Lord Justice Sedley warned: “A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without

losing the option of termination, at least where the other party has offered to make suitable amends”.

Conclusions

67. I have used sub-headings to set out my conclusions in relation to each alleged breach and have done so using the language and order of the alleged breaches set out in the List of Issues.
68. However, before dealing with each specific allegation, it is important to set out the requirements for a fair capability/performance dismissal process.
69. Section 98(1)(b) and (2) of the Employment Rights Act 1996 (ERA) sets out the potentially fair reasons for dismissing an employee. One such reason is where the dismissal “relates to the capability or qualifications of the employee for performing work of the kind which he was employed... to do”.
70. It has long been established that employers should follow a fair procedure before dismissing an employee for incapability. The key basic stages of a fair capability (poor performance) dismissal are:
- proper investigation/appraisal of the employee’s performance and identification of the problem
 - warning of the consequences of failing to improve
 - reasonable chance to improve.
71. Employees should be given the opportunity to answer allegations of poor performance.
72. Given the requirement to issue warnings, and a reasonable period to improve, a properly conducted performance management process usually lasts several months.
73. The Acas Code of Practice, at paragraphs 5 to 31, summarise the steps employers must normally follow in managing disciplinary situations, namely:
- a. establish the facts of each case
 - b. inform the employee of the problem
 - c. hold a meeting with the employee to discuss the problem
 - d. allow the employee to be accompanied at the meeting
 - e. decide on appropriate action
 - f. provide the employee with an opportunity to appeal.
74. The Code confirms that ‘disciplinary situations’ include ‘poor performance’.
75. As set out in the findings of fact above, the Claimant was not properly informed of concerns. Although there were regular, daily, discussions about tasks and work to be done, on the Respondent’s own evidence these were informal conversations.

76. The Claimant was not properly notified about any concerns. No meetings were held to discuss the issues. The Claimant wasn't able to give his comment on concerns. The Claimant was not warned of any consequences of not improving. The Claimant was not given any time to improve, was not set any objectives. The Claimant was not given any chance to appeal the decision.
77. He was simply told his employed position was being ended and he had an option to move to being a self-employed driver, and work in the office for one day a week.
78. There was no evidence provided that justified abandoning a fair process.
79. Indeed, there was no process at all.
80. Any concerns about the Claimant's performance were not properly managed and was handled unprofessionally and without proper consideration.
81. Set out below are my conclusions in relation to each of the alleged breaches.

Tell Claimant that his wages were too high, and he would need to go on the road as a self-employed taxi driver.

82. No meeting was called to discuss the important issue of the Claimant's employment ending. Mr. Gorman simply informed the Claimant, whilst he was working and in front of others, that his wages were too high and he would need to move to a driver on a self-employed basis. I do consider this was conduct that destroyed or caused serious damage to the relationship of trust and confidence between the employer and employee. As I have reached this conclusion, I have gone on to consider the second limb of the test – whether the Respondent acted without reasonable cause. I conclude that the Respondent did not have reasonable cause to act in this way.
83. I do not accept that performance levels had been properly addressed, and noting the complete lack of any proper performance management process, simply informing an employee with over 4 years' service, in a public forum, that their employment would be ending and they could move to being a self-employed driver was entirely inappropriate.
84. This is not conduct that an employee can be expected to tolerate.
85. On an objective assessment, I do consider that this to be a fundamental breach of the implied term of trust and confidence. The Respondent had no reasonable or proper cause for acting in this way.

Fail to inform the Claimant of any performance concerns and fail to warn the Claimant of any consequences associated with poor performance.

86. As set out above, fundamental parts of a fair capability process involve clearly informing an employee of performance concerns and warning them of the consequences.
87. I found that there had not been any clear information given to the Claimant about performance concerns. Daily discussions about work and task allocations is not sufficient to put an employee on notice that the level of their performance was causing concerns. Further, the Respondent accepted that the Claimant was not given any warnings.
88. This is not conduct that an employee can be expected to tolerate.
89. On an objective assessment, I do consider that this to be a fundamental breach of the implied term of trust and confidence. The Respondent has no reasonable or proper cause for acting in this way, it is entirely reasonable for the Respondent to have acted differently and followed a fair and proper process.

Serve the Claimant with notice of three weeks and require him to work as a taxi driver during his notice period.

90. Although the Claimant spent most of his working time in the office, he did drive regularly to cover school runs or assist where required.
91. However, being given notice in the abrupt manner in which he was, namely without being called to a private meeting and being told and in a public area was an act that caused embarrassment. Requiring the Claimant to immediately move to only driving during his notice period whilst Jack Childs remained working in the office, when both had been told the wage bill was too high and they would need to move to working on the road, was humiliating.
92. This is not conduct that an employee can be expected to tolerate.
93. On an objective assessment, I do consider that this to be a fundamental breach of the implied term of trust and confidence. The Respondent has no reasonable or proper cause for acting in this way. The Respondent could have managed the situation very differently and invited the Claimant to a meeting. There was no evidence put forward to demonstrate the need for the Claimant to only drive during his notice period.

Tell the Claimant that his notice period would be extended, and this caused further stress.

94. The Respondent did not provide the Claimant with the correct notice. The Claimant flagged this and the Respondent acknowledged and increased his notice period by the requisite additional week.
95. However, the Respondent also increased the notice period further, the rationale being that the Claimant could remain working for a period of time that would give him pay equivalent to a statutory redundancy payment. I acknowledge the Claimant did not wish to remain at the Respondent given the way he had been treated, and the idea of remaining for a longer period

may have been stressful. However, I do not consider, in this respect, that objectively assessed, the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. The Respondent was seeking to avoid a contentious situation, and although it did not conduct the meeting on 22 March 2023 professionally, I do not consider increasing the notice period in itself amounted to a breach of the implied term of trust and confidence.

Act in such a way to cause stress.

96. Overall, when considering the actions of the Respondent from 14 March 2023, until his resignation on 27 March 2023, I conclude that the Respondent acted in such a way that any reasonable employer would know would cause stress to an employee. The Claimant had previously worked hard and long hours for the Respondent, and had been working in the office for some four years.
97. The Respondent's entire approach to the management of any concerns it may have and the issuing of notice with an alternative option of the Claimant only staying with the Respondent as a self-employed driver was unprofessional and inconsiderate.
98. On an objective assessment, I do consider that this to be a fundamental breach of the implied term of trust and confidence. The Respondent had no reasonable or proper cause for acting in this way.
99. Mr. Gorman says he runs a number of businesses, and therefore this implies he is an experienced business person. Had the Respondent had genuine concerns that the level of his performance was sufficient to warrant dismissal it should have acted in a reasonable and proper way to try and secure an improvement and warn the Claimant about potential consequences. The Respondent's actions undoubtedly caused the Claimant upset, and stress about his future, especially noting that he has a young family to care for.
100. As I have found the Respondent did breach the implied term of trust and confidence as set out above, I have gone on to consider whether the breach, or indeed breaches, caused the Claimant to resign.
101. I have concluded that the Respondent's breaches did cause the Claimant to resign. There is no evidence that the Claimant was unhappy in his role prior to 14 March 2023, and he acted promptly in handing in his notice in response to the poor treatment of him by the Respondent.
102. I do not find that the Claimant affirmed the contract following the breaches.
103. Accordingly, the Claimant was unfairly dismissed in accordance with section 95 of the Employment Rights Act 1996.

104. Further, when the proceedings were begun the Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is not just and equitable to make an award of an amount equal to four weeks' gross pay. In accordance with section 38 Employment Act 2002 the Respondent shall therefore pay the Claimant the sum equal to two weeks' gross pay.
105. A separate remedy hearing will be listed.

Employment Judge G Cawthray

Date 28 October 2023