



EMPLOYMENT TRIBUNALS

Claimant: Mr R Imber
Respondent: Fuels Transport and Logistics Ltd
Heard at: East London Hearing Centre (via CP)
On: 4 and 5 October 2023
Before: Employment Judge Davidson

Representation

Claimant: in person
Respondent: Ms V Goobler, Solicitor

Judgment having been given orally at the hearing and sent to the parties on 16 October 2023 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by email dated 21 October 2023, the following reasons are provided:

REASONS

Issues

Constructive Unfair Dismissal (Employment Rights Act 1996)

1. Was the Claimant dismissed in law?
 - 1.1. Did the Respondent breach a term of the Claimant's employment entitling him to treat himself as dismissed?
 - 1.2. The Claimant is relying on a breach of the implied term of trust and confidence (the alleged acts are set out below). The Tribunal will need to decide:
 - 1.2.1. 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
 - 1.2.2. Whether it had reasonable and proper case for doing so.
 - 1.3. The Claimant relies on the following matters as amounting to a breach:

- 1.3.1. being subjected to two years of bullying and harassment by colleagues which included:
 - 1.3.2. damage to his car on two separate occasions;
 - 1.3.3. interference with his road tanker whereby safety critical features were removed;
 - 1.3.4. verbal attacks;
 - 1.3.5. threats of physical violence;
 - 1.3.6. failure to follow correct procedure/an unsatisfactory response in respect of the grievance raised on 14 March 2022;
 - 1.3.7. an unsatisfactory grievance outcome in respect of the grievance raised on 15 September 2022 as concerns were not taken seriously by the Respondent;
 - 1.3.8. a lack of support in respect of return to work and a failure by the Respondent to provide a safe and secure workplace;
 - 1.3.9. the Respondent's denial of a request to transfer the Claimant to a different workplace;
- 1.4. Did the above matters occur?
 - 1.5. If so, did they individually or collectively amount to a repudiatory breach of contract entitling the Claimant to resign?
 - 1.6. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was the reason for the Claimant's resignation.
 - 1.7. 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.

Evidence

2. The tribunal heard evidence from Mat Church, the Claimant's former manager, and Jemma Stirk, Regional Operations Manager. The Claimant gave evidence on his own behalf and submitted an 'impact statement' from his wife. The tribunal also had a bundle of documents running to 291 pages.

Facts

3. The tribunal found the following facts on the balance of probabilities.
4. The Respondent operates a haulage company providing specialist bulk deliveries. The Claimant was employed from 19 October 2020 as a Driver

Technician (Tanker Driver) working out of the Purfleet terminal. He transferred to the Respondent on 1 June 2021 by way of a TUPE transfer.

5. The Claimant's manager, Mat Church, conducted probationary review meetings on 17 November 2020, 16 December 2020 and 20 January 2021. There is no record in the notes of these meetings of any complaints of bullying from the Claimant. Mat Church did not recall this being discussed although the Claimant believed that he had raised matters in the later meetings, after, on his account, he began to be bullied by various colleagues.
6. It is accepted that there was bad feeling between the Claimant and some of his colleagues arising from two disagreements:
 - 6.1. the Claimant filmed an Amazon driver apparently dumping goods in a nearby depot and put the footage on social media. That driver then lost his job and the Claimant's colleagues were unhappy at the part played by the Claimant in another person losing their job;
 - 6.2. the Claimant set up a company matching HGV drivers looking for extra work with hauliers needing extra cover. His colleagues believed that he was offering the Respondent the opportunity to use drivers via this service and were unhappy that this might circumvent union protocols.
7. Mat Church spoke to the Claimant about both these incidents informally, resulting in the Claimant deleting the footage of the Amazon driver and distancing himself from the operation of the new company, passing it to his wife. He told the Claimant's colleagues who had complained about this that it was not their business and it was a matter between the Claimant and the Respondent.
8. The Claimant's colleagues then raised a 'collective grievance' against the Claimant about the Claimant's company, whether he had influence over recruitment decisions and noting that he did not attend union meetings despite being rostered and paid so that he can attend.
9. Shortly afterwards, the Claimant raised a grievance with Mat Church, dated 14 March 2022, alleging he was being bullied by colleagues in various ways, another driver and pulled his petrol tanker in front of him and laughed, his truck had been sabotaged and that his car door had been damaged while it was parked in the car park.
10. Mat Church investigated the collective grievance, held a meeting and gave his outcome, explaining the Respondent's position, by letter dated 12 April 2022.
11. Mat Church then started to investigate the Claimant's grievance. He did not have access to any CCTV footage and none of the other drivers he spoke to gave him any information regarding the alleged bullying.

12. He had an informal discussion with the Claimant and asked if he had any evidence but the Claimant said he did not have any. Mat Church told the Claimant that it would be difficult to uphold the allegations without any evidence if it was simply one person's word against another. The Claimant said he would draw a line in the sand and move on. He did not withdraw the allegations in his grievance but agreed that he did not want Mat Church to carry out any further investigations.
13. On 11 September 2022, the Claimant returned to his car at the end of his shift to find that the rear window had been damaged. He complained to John Ackerley, stating that he felt that he was being intimidated. On 15 September 2022 he raised another grievance, alleging bullying by colleagues, in particular sabotage of his truck and damage to his car. The Claimant went on sick leave with work-related stress.
14. The grievance was passed to Jemma Stirk to investigate. She did not know the Claimant and was not aware of the previous incidents.
15. On receipt of the grievance, she agreed to investigate the matters raised in the September grievance as well as the matters raised in the March grievance. The Claimant submitted a document setting out his position in relation to the matters in issue. They held a meeting on 1 November 2022. The Claimant identified three individuals whom he thought would be able to give evidence to support his allegations.
16. Jemma Stirk investigated the grievances and contacted those individuals named by the Claimant. One of them did not respond to her email and she spoke to the other two, but they were unable to provide any supporting evidence. Jemma Stirk also spoke to the person against whom the Claimant had made the allegations (Danny Morris). He denied being abusive. He added that he had been a witness to a conversation between the Claimant and Rob Battie but that, although there was a disagreement, there was no swearing and it was not abusive.
17. Jemma Stirk met with Peter Little, whom the Claimant had accused of bullying and sabotage. Peter Little denied the allegations and said he was shocked at the accusation.
18. Jemma Stirk then met with Rob Battie, who denied being abusive and agreed that he wanted nothing to do with the Claimant because he thought the Claimant was trying to undermine their jobs.
19. Jemma Stirk also met with Steve Rogers who denied witnessing any incident as alleged by the Claimant.
20. She reviewed CCTV of the car damage and found no evidence to implicate Danny Morris in the damage.

21. During this period, the Claimant remained on sick leave.
22. Jemma Stirk gave her the outcome of the grievance on 15 December 2022. She told him that she was unable to uphold his grievance as there was insufficient objective evidence to reach any conclusions regarding what had happened. She went on to look at resolutions suggested by the Claimant. These did not result in any transfer for the Claimant and he submitted his resignation on 26 December 2022.
23. On 19 January 2023, Jemma Stirk wrote to the Claimant to ask him to reconsider his resignation, giving him the updated vacancy list and informing him of his right to appeal. The Claimant did not consider that any of the alternative jobs were suitable for him due to commuting distance and he decided that there was no point appealing against the grievance outcome.

Law

24. The relevant law is as follows.
25. An employee is regarded as dismissed where the employee terminates the contract of employment in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
26. There must be a breach of contract by the employer, which is sufficiently serious to justify the employee leaving, or it must be the last in a series of incidents which justify his leaving (last straw doctrine). The employee must leave in response to the breach and not for some other unconnected reason and the employee must not delay too long otherwise he may be deemed to have waived the breach and affirmed the contract.
27. The implied term of mutual trust and confidence was established by the House of Lords in *Malik v BCCI* [1998] AC 20, which provided that the employer shall not '*without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".
28. This is an objective test (*London Borough of Waltham Forest v Omilaju* [2005] IRLR 35).

Determination of the issues

29. I determine the issues as follows:
30. I find that the reason for the Claimant's resignation was the way he felt he had been treated by his colleagues and by his employer at work. I accept that the damage to his car triggered his sickness absence and that he had a genuine fear of returning to work in that place due to the feeling of apprehension of what might happen at any time.

31. However, I need to consider whether this amounts to constructive dismissal – has there been a fundamental breach of the implied of trust and confidence? I will look at the instances of bullying and harassment relied on by the Claimant and then, separately, the Respondent's actions in investigating and addressing any issues.
32. In relation to the allegations of bullying and harassment, the Claimant has not been able to provide any evidence to support many of his allegations. This is for a number of reasons:
 - 32.1. failure to report matters quickly enough for evidence to be gathered (whether or not footage is kept for 24 hours or 28 days is not the real issue). The Claimant did not press the red button, nor did he bring it to manager's attention immediately when there would have been no issue about retention of the footage;
 - 32.2. failure, for example, to take photos of message on the whiteboards;
 - 32.3. his witnesses not giving supporting evidence;
 - 32.4. CCTV not being helpful
33. The evidence that the Claimant was able to produce was evidence of the physical damage to his car. On one occasion the damage had definitely happened on the premises. In the other case it had probably happened on the premises.
34. It was also accepted that the Claimant was unpopular with many of his colleagues arising out of the Amazon driver incident and his company supplying drivers. However, the Respondent was unable to find any objective evidence to support the Claimant's allegations against any individual colleagues.
35. In relation to the allegations of bullying and harassment by colleagues, if I find that it has taken place, I must then consider whether the Respondent would be vicariously liable for these acts.
36. On balance, I find that there was an intimidating atmosphere but there was insufficient evidence to result in disciplinary action against any individual. I find that anybody carrying out any acts of sabotage or vandalism would not be doing so as part of their duties and therefore the Respondent would not be vicariously liable.
37. As regards the Respondent's own actions to address the working environment, Jemma Stirk addressed the generality of the problem by restating the Dignity At Work policy. Mat Church told the collective grievance individuals that it was not their business. The Respondent also took steps to offer the Claimant an opportunity to work in a different

environment. For various reasons, this did not result in a transfer. I do not consider that either party is to blame for the lack of an outcome from this route.

38. The Claimant considers that the Respondent should have done more. However, he has not identified precisely what further steps the Respondent should have taken.
39. I then go on to look at whether the Respondent carried out a proper grievance process. I find that it did. I conclude that the Claimant agreed to 'draw a line in the sand' after the first grievance. At the point he agreed this, he was aware that there was no evidence to support his allegations. Jemma Stirk then investigated both grievances. I find that her grievance was thorough and independent.
40. In order to find that the grievance process amounted to a fundamental breach of contract entitling the Claimant to resign, there must be more than 'things that could have been done better', there must be a wholesale failure to engage with the grievance process.
41. In conclusion, while expressing sympathy with the Claimant and accepting his reasons for resigning, I find that the Respondent has not fundamentally breached the term of trust and confidence and therefore the constructive dismissal claim fails.

**Employment Judge Davidson
Dated: 6 March 2024**