



EMPLOYMENT TRIBUNALS

Claimant: Mr Dean Chafer

Respondent: Benfleet Scrap Co Limited

Heard at: East London Hearing Centre by Cloud Video Platform ('CVP')

On: 13 February 2024

Before: Employment Judge Cansick

Representation

For the Claimant: In person

For the Respondent: Mr T Hussain, Litigation Consultant

RESERVED JUDGMENT

The claimant's claim of constructive unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Driver, from 10 January 2021, until his employment ended on 23 February 2023.
2. The claimant claims he was constructively dismissed as a result of the way the respondent conducted a disciplinary process against him. He further claims that he was forced to resign by the respondent. This is claimed to have breached the implied term of mutual trust and confidence of the contract of employment.
3. The respondent does not accept the process was conducted in an inappropriate way or that the claimant was forced to resign. As such it asserts there was no breach of contract.

4. All parties appeared by CVP. The claimant was not represented. The respondent was represented by Mr T Hussain, a Litigation Consultant.

Preliminary Issues

5. As a preliminary issue the respondent made an application to extend the time for presenting their response, pursuant to Rule 20 of the Employment Tribunal Rules of Procedure. The response had been presented seven days late. In respect of this the respondent's HR Manager, Ms Kelly Tuffen, gave evidence. She detailed that the claim had been placed on her desk under other paperwork. She had not seen it until she was later tidying her desk. As soon as she found the claim, arrangements were made for the response.
6. The respondent made submissions that I should extend the time for the response as it was a genuine mistake, there is a strong defence and the prejudice is worse to the respondent than the claimant. The claimant considered the reason there was no response was out of disrespect for the case and the application should, therefore, be refused.
7. In considering the application I applied the overriding objective and took note of the guidance in *Kwik Save Stores v Swain and ors 1997 ICR 4* as to how the judicial discretion, in respect of whether or not to extend time, should be exercised. The process of exercising the discretion involves taking into account all relevant factors and balancing them. The judge should always consider the respondent's explanations to why an extension of time is required, the balance of prejudice and the merits of the defence.
8. I considered that the failure to respond in time was a genuine mistake by the respondent as detailed by Ms Tuffen. I also considered that the balance of prejudice favoured the respondent as if the response was not allowed, they could not defend the claim. Whilst if the response was allowed the claimant could still present his claim. I also noted the respondent had put forward a detailed defence to the claim. For those reasons I allowed the application to extend the time to present the response.
9. The respondent had also previously written to the Tribunal requesting reference to a without prejudice meeting, on 23 February 2023, be removed from the claimant's claim form as inadmissible under section 111A of the Employment Rights Act 1996. This meeting is central to the claimant's claim as it is at this meeting that he alleges he was forced to resign. However, no application was made by the respondent's legal representative at the hearing in regard to such. Also, the issue was explicitly addressed in the statements of the respondent's witnesses. I, therefore, continued on the basis that it was accepted that evidence of the meeting was to be considered in the claim.

The hearing

10. The claimant gave sworn evidence. The respondent's sworn witness evidence was given by Ms Kelly Tuffen (HR Manager), Ms Dawn Taylor (Skip Administrator), Ms Eliza Day (Training Co-ordinator/Administration Assistant) and Ms Tiffany Koch (Business Manager).

11. I had before me a bundle of documents of 169 pages with a separate index. Page references in this document refer to the pages of that bundle. Also, during the hearing, at the request of the claimant and with the agreement of the respondent, the recording of the disciplinary hearing on 21 February 2023 was played.

Issues to be decided

12. There was a discussion at the outset of the hearing about the relevant issues. The issues in this claim are:
 - 12.1 *Did the respondent's conduct of the disciplinary process, breach the implied term of trust and confidence of the contract?*
 - 12.2 *Was the respondent forced to resign at the meeting on 23 February 2023? If so, was this alone, or cumulatively with the conduct of the disciplinary process, a breach of the implied term of trust and confidence of the contract?*
 - 12.3 *If a breach of contract, was it a reason for the claimant's resignation?*
 - 12.4 *Did the claimant affirm the contract before resigning? Did the claimant's words or actions show that they chose to keep the contract alive even after the breach?*
 - 12.5 *If the claimant has been constructively dismissed, should any reductions to the award be applied?*
13. It was agreed that if it was found that the claimant was constructively dismissed then remedy would be dealt with at a separate hearing.

Findings of fact

14. The claimant began employment with the respondent on 10 January 2021, as a Driver, at their site in Basildon. The respondent is a business providing scrap and waste services. Part of the appellant's salary was paid in cash.
15. Around 16 or 17 February 2023, Ms Tuffen overheard a conversation between Ms Taylor and another employee about tickets having gone missing. Ms Tuffen asked Ms Taylor for details of what they were talking about and was informed of two incidents of missing cash the claimant may have been involved with on 8 and 13 February 2023. Further information came to light that the claimant had also caused damage to one of the company vehicles. The respondent initiated an investigation.
16. An investigation meeting took place on 17 February 2023 (page 128-129). At the meeting the claimant was asked questions about damage to a company vehicle and an incident on 8 February 2023, for which it was alleged he had not returned money collected from a customer. He accepted the damage to the vehicle. Regarding the money, he could not recall if he had returned it to the office or not. He had checked the lorry but could not find it there.
17. Following the investigation meeting the appellant was suspended pending the outcome of the investigation.

18. The respondent obtained a statement from a Mr Paul Faux, dated 20 February 2023, regarding damage that had been caused to a vehicle while in the claimant's possession. This included damages to arms and a centre pole on the vehicle which has cost £709.58 plus VAT to repair (page 130).
19. On 21 February 2023, a statement was submitted by Ms Taylor (page 135). In that statement she detailed a job on the 8 February 2023 for which she had not received cash from the claimant. She confirmed with the customer they received the skip and had paid in cash. Ms Taylor asked the claimant to check in his lorry if the cash was there and he confirmed it was not. Ms Taylor further detailed that on 14 February 2023, she noticed that she did not have payment for a job on 13 February 2023. She contacted the customer who confirmed he had received the skip and paid in cash. She was then able to confirm from the tracker on the vehicle that went to that job, that the driver that day was the claimant.
20. In a letter dated 20 February 2023, from Ms Tuffen, the appellant was invited to a disciplinary hearing (page 131). The letter informed the claimant that the hearing was to consider allegations of misplaced cash and damage to a vehicle. The claimant was advised that if the allegation was proven it will be considered gross misconduct and his employment might be summarily terminated. He was informed he would be given the opportunity to explain his actions, that he could be accompanied to the hearing and other relevant matters.
21. The disciplinary hearing was conducted on 21 February 2023 by Ms Tuffen (p 152-154). Ms Day took notes. The claimant was asked about both incidents where cash was alleged not to have been received and the damage to the vehicle. Regarding the 8 February 2023 incident, the claimant could not state if he handed in the money or not. Regarding the 13 February 2023 incident, the claimant stated he did not have an explanation as to why that job was not on his worksheet and he explained he would check his work bag for the cash when he got home. He denied any stealing of cash. Regarding the vehicle damage, he explained how the damage happened and emphasised that over two years he had not caused any other vehicle damage. The meeting ended with Ms Tuffen informing the appellant they would consider what he had said at the hearing and discuss with management.
22. The claimant considered that Ms Tuffen conducted the hearing in a way that was unfair to him. The recording of the hearing was played to me. The claimant did not point out specific parts that were unfair. I do not consider the recording demonstrated the interview was unfair. The claimant was asked about the allegations and responded.
23. On 23 February 2023, the respondent held what they considered a 'without prejudice' meeting with the claimant. Ms Tuffen and Ms Day attended on behalf of the respondent. As it was considered a 'without prejudice' meeting notes were not taken. The claimant alleges at this meeting he was forced to resign. He detailed in evidence 'I was told in no uncertain terms that any future employment would be awkward and unbearable for me, and I would be given a week's money plus my holiday entitlement, the company would not pursue any money for the damages, or 'misplaced money' and I'd be given a good reference'.
24. Ms Tuffen and Ms Day both gave evidence that it was the claimant who stated he could not work with the company anymore as people would see him as a thief. The claimant stated he could get money elsewhere and wanted to resign.

Ms Tuffen detailed she agreed with the claimant that people might see him as a thief but made clear she was supportive of him and had even gone to view the CCTV from the office to see if it would help (which it had not). Ms Tuffen told the claimant that if he was going to resign, he should put such in writing. It was agreed the claimant would be paid for the remainder of the week and the following week. Additionally, he would not have to pay for the damage to the vehicle. Ms Day's evidence of the meeting supports what Ms Tuffen stated.

25. I prefer the evidence of the respondent regarding what was said at the meeting. Both Ms Tuffen and Ms Day are consistent in what is detailed to have happened. The claimant's resignation letter is also consistent with the decision to resign having been made voluntarily by him. There is no mention of a forced resignation in it. The evidence of the investigation up to the point of the meeting demonstrates the appellant was able to set out his case and what he said was being considered, which is further suggestive that the claimant was not in any way forced to leave.
26. Following the 'without prejudice' meeting, on the same day, the claimant submitted his resignation in writing stating such was with immediate effect (page 136).
27. On 13 March 2023, the appellant submitted a grievance to the respondent (page 143). In that letter he stated he was appealing his forced resignation. He detailed he was given no alternative but to resign. The claimant detailed that he wanted to be reinstated.
28. On 30 March 2023, a grievance meeting took place. The meeting was chaired by Ms Koch. Mr Chafer was accompanied by Mr Steve Webb (pages 148-150). Following that meeting in a letter dated 7 April 2023, the respondent informed the claimant that his grievance was not upheld and detailed why.

Relevant law

29. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).
30. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).
31. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is

likely to be able to accept that repudiatory breach and terminate the employment contract (Morrow v Safeway Stores Plc [2002] IRLR 9).

32. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (Garner v Grange Furnishing [1977] IRLR 206).
33. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (Wright v North Ayrshire Council [2014] ICR 77). The tribunal is able to ascertain the true reason for the employee's resignation (Weathersfield Ltd v Sargent [1999] ICR 425).
34. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (WE Cox Turner (International) Ltd v Crook [1981] ICR 823).
35. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB), Calver J said, at para 121:

It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case.

Conclusions

36. I remind myself that the burden of proof rests on the claimant to demonstrate that they have been constructively dismissed. I also remind myself that consideration of whether there has been a breach is through an objective person approach.
37. I consider that the disciplinary process was conducted fairly and appropriately. Up to the point where the claimant tendered his resignation, he had taken part in both an investigation and disciplinary hearing. Statements had been obtained in

the investigation detailing the allegations. The claimant had also been informed about the nature of the hearing and possible consequences. The claimant was given an opportunity to address the allegations at the hearings and did so.

38. At the request of the claimant the recording of the disciplinary hearing was played during this hearing. I did not identify anything inappropriate or unfair from the respondent in that hearing. The claimant although detailing the recording showed it was unfair did not identify any valid specific reason why.
39. I consider the disciplinary process was fair, there is no basis for finding it was conducted in a way that breached the implied term of trust and confidence between the parties.
40. I also do not consider that the claimant was forced to resign. At the 'without prejudice meeting' it was agreed if the claimant resigned, he would be paid for the remainder of the week and the following week. In addition damages to the vehicle would be disregarded. There was, however, nothing forcing the claimant to resign. The claimant himself chose to resign. The actions of the respondent at the meeting did not breach the implied term of trust and confidence.
41. The claimant also considered it was relevant that some of his salary was paid to him by the respondent in cash. I do not see any relevance of this to the issues in the claim. It does not inform how the disciplinary process was conducted or whether the claimant was forced to resign. Even though it is not relevant, in any event there is no evidence presented demonstrating that there was anything wrong by the respondent making payments this way.
42. I have considered the claimant's case carefully, however, the matters complained about, when viewed objectively, were not a breach of the contract.

**Employment Judge Cansick
Date: 7 May 2024**