EMPLOYMENT TRIBUNALS

Claimant: **Mr Mark Bunn**

Respondent: **Jhetam Associates Limited**

Heard at: **East London Hearing Centre (by video)**

On: **18 July 2024**

Before: **Employment Judge Volkmer**

Representation
Claimant: In person

Respondent: did not attend

JUDGMENT having been sent to the parties on 23 July 2024 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

Background

1. By a claim form presented on 23 May 2023, the Claimant brought complaints of disability discrimination and breach of contract (notice pay).

2. In summary, the Claimant's case was that during his short period of employment as an Administrative Clerk, he was subjected to rude comments by Mr Jhetam and undue surveillance, was called stupid and shouted at repeatedly until he had no option but to resign. This was denied by the Respondent.

3. A Public Preliminary Hearing was listed for 17 May 2024 to determine whether the Claimant was disabled pursuant to section 6 of the Equality Act 2010. The Respondent was represented at that hearing. It was determined that he was not, and as such, the disability discrimination complaints were dismissed. A separate judgment was been issued in relation to that.

4. All that remained to be determined was point 7 of the list of issues in the Case Management Order of 15 September 2023: "*To what period of notice, if any, was the Claimant entitled when he resigned on 5 April 2023? It is not in dispute that he was not paid any notice*.". The Claimant's case was that

he was wrongfully constructively dismissed and was therefore entitled to be paid his notice period of one month. The Respondent denied that the Claimant had been dismissed and therefore took the position that he was only entitled to be paid for the days that he actually worked.

5. The parties had agreed at the previous preliminary hearing that the hearing bundle of 128 pages prepared for the 17 May 2024 hearing would be adopted as the Hearing Bundle for this hearing. The page references in this document refer to that bundle.

6. The Claimant had not prepared a witness statement but adopted his ET1, and the statement at page 107a under oath as being true to the best of his knowledge and belief. The Respondent did not attend, was not represented, and no witness statement was submitted on the Respondent's behalf.

Facts

7. In the absence of any cross-examination of the Claimant's evidence, nor Respondent witness to contradict the Claimant's evidence of factual events, the Claimant's evidence was upheld. On that basis, the following findings of fact were made.

8. The Claimant began working for the Respondent as an Administrative Clerk on 13 March 2023. He informed the Respondent in interview that he had previously had "*battles with mental health*". On 30 March 2023, Mr Jhetam became aggressive, calling the Claimant "*stupid*" on the phone and aggressively telling him to "*listen to what I'm saying"*.

9. On 3 April 2023 things got worse throughout the day. The Claimant was given incomplete instructions to do work tasks but when he asked questions, Mr Jhetam shouted at him to "*get on with it"* and shouted at him "*don't waste my time"*. Another member of staff was also instructed to press the Claimant to do the task. The Claimant was told that he had to send an email by 6pm or he would be *"for it*". This caused the Claimant anxiety at home that evening.

10. The following day, Mr Jhetam called the Claimant to his office and told him that he was useless, had not done what he had been asked, was making excuses and was stupid. On 5 April 2024, Mr Jhetam continued making similar comments to the Claimant, saying that he was making excuses, wasting time and calling him stupid.

11. The Claimant resigned in response the same day, in the evening of 5 April 2023.

12. The Claimant's employment contract, at page 88, stipulated at clause 3 that the contract "*may be terminated by notice of one month on either side*".

The Law

13. Under section 95(1)(c) of ERA 1996, an employee is dismissed if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without

notice by reason of the employer's conduct. This is often referred to as a "constructive dismissal".

14. If the claimant's resignation can be construed to be a dismissal then the Tribunal must determine whether the dismissal was wrongful. An action for wrongful dismissal is a common law breach of contract claim. The Tribunal must determine whether the dismissal is in breach of contract. This will involve a finding of whether there was misconduct which is so serious that it entitled the employer to dismiss the employee. If there was no such misconduct, the dismissal is a wrongful dismissal. Whether the employer's actions are reasonable or not is irrelevant (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*

15. The leading authority in relation to constructive dismissal and the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27*: "*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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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. He will be regarded as having elected to affirm the contract*."

16. The Tribunal must therefore establish that there is a relevant contractual term and decide if it has been breached. If there has been a breach of contract, the question is then whether the breach is fundamental, in other words whether it repudiated the whole contract. In *Tullett Prebon PLC and Ors v BGC Brokers LP and Ors* Maurice Kay LJ endorsed the following legal test at paragraph 20: "… *whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract*."

17. As set out in in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL* it is an implied term of any contract of employment 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. This is known as the implied term of trust and confidence. The test of whether there has been a breach of the implied term of trust and confidence is objective, and any breach of it will amount to a fundamental breach. That is because the essence of the breach of this implied term is that it is calculated or likely to destroy or seriously damage the relationship.

18. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though that incident by itself does not amount to a breach of contract (*Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493*).

19. If a fundamental breach of contract has been established, the employee may accept the breach and resign, or affirm the contract. If the employee resigns, in order to amount to constructive dismissal, such resignation must be caused by the breach of contract in question.

20. *Jones v F Sirl and Son (Furnishers) Ltd 1997 IRLR 493, EAT,* in order to decide whether an employee has left in consequence of fundamental breach, the tribunal must look to see whether the employer's repudiatory breach was the effective cause of the resignation. There may have been concurrent causes operating on the mind of an employee whose employer had committed fundamental breaches of contract (including, in this case the offer of an alternative job). Where there was more than one cause operating on the mind of an employee it is the task of the tribunal to determine whether the employer's actions were the effective cause of the resignation.

21. The Court of Appeal in *Meikle v Nottinghamshire County Council 2005 ICR 1, CA* made clear that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.

Discussion and Conclusions

22. The test for constructive dismissal is an objective rather than a subjective test. Looking at all the circumstances objectively, from the perspective of a reasonable person in the position of the Claimant. In relation to an alleged breach of the implied term of trust and confidence, I must consider:

    a. was there 'reasonable and proper cause' for the conduct; and

    b. if not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

23. I consider that even if there were legitimate performance concerns this would not constitute reasonable and proper cause for the relevant conduct. Namely using language such as calling an employee "*stupid*", useless, shouting at them to "*get on with it",* "*don't waste my time"*, and telling them that they would be *"for it*". In any case, I did not have any witness evidence for the Respondent in order to make a finding that there were such performance concerns.

24. It is also clear that shouting at and insulting an employee in this manner constitutes conduct that is also likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

25. I made a finding of fact that the Claimant resigned in response to the conduct in question. The resignation was caused by the conduct in question. No argument was made by the Respondent regarding afirmation.

26. On that basis, I conclude that the Claimant was constructively dismissed.

27. The Respondent denied dismissal. No alternative position was put forward that there was any misconduct entitling the Respondent to dismiss the Claimant. As such I found that the dismissal was wrongful.

28. The Claimant was entitled to a notice period of one month (see above at paragraph 12). His gross pay was £26,500 per annum (see offer letter at page 85). If this sum is divided by 12, and therefore into a montly payment it equates to £2,208.33 per month.

29. It is noted that a deduction was made from this in error when issuing the judgment, when in fact the Claimant was entitled to a months' pay from the date of resignation. The three days' pay he received related to 3, 4 and 5 April 2023, prior to his resignation. As such the judgment sum is corrected to the gross amount of £2,208.33.

COSTS

The Claimant's costs application

30. The Claimant made an oral application for costs at the end of the hearing. He alleged that the Respondent had behaved unreasonable on the grounds that:

    a. the Respondent had lied about the relevant events in its ET3; and

    b. the Respondent had sent the Claimant letters saying that his claim would fail.

The Law

31. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules") provides:

    1) A Tribunal may make a costs order or a preparation time order, and shall consider

    whether to do so, where it considers that –

    a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or

    b) Any claim or response has no reasonable prospect of success or
    c) ……

2) A Tribunal may also make such an order where a party has been in breach of any order or any practice direction or where a hearing has been postponed or adjourned on the application of a party."

32. *Rule 78 provides:*

"1) A costs order may –
a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party."

33. Although the Tribunal Rules provide me with the power to make costs awards, such awards in Employment Tribunal proceedings are the exception rather than the rule (*Gee v Shell UK Ltd [2003] IRLR 82*).

34. *Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN* sets out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court*."

35. The EAT decided in *Dyer v Secretary of State for Employment EAT 183/83* that "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable. Whether conduct is unreasonable is a matter of fact for the Tribunal to decide.

36. In *AQ Ltd v Holden UKEAT/0021/12/CEA* His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. However, Judge Richardson said in paragraph 33:

"*This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have*

behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity."

37. Similarly, in *Vaughan v London Borough of Lewisham & Ors (No. 2) [2013] IRLR 713*, the EAT declined to interfere with a substantial costs order against an unrepresented party. Underhill J observed that "*the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant*".

38. *Calderbank v Calerbank [1975] 3 All ER 333* is a case regarding without prejudice save as to costs offers, this applies in family proceedings and not to Employment Tribunal proceedings. However in *Kopel v Safeway 2003 IRLR 753* the EAT upheld the Tribunal's finding that the Claimant's failure to accept the employer's substantial offer of settlement was unreasonable conduct of the proceedings. The Tribunal is entitled (but not required) to make a finding on the facts that the rejection of a without prejudice offer is unreasonable, and may take it into account in exercising its discretion in relation to costs. Costs warnings may also be taken into account.

39. In *McPherson v BNP Paribas (London Branch) [2004] EWCA Civ* 569 Mummery LJ stated:

[40] … "*The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred.*"

40. In *Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420*, CA Lord Justice Mummery held:

"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had." That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant*."

41. In *Lodwick v Southwark London Borough Council [2004] ICR 884*, CA, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

Discussion and Conclusions

42. I did not uphold the Claimant's allegation of unreasonable behaviour. Although I had preferred the Claimant's evidence in relation to the events that took place, this was not the same as making a finding that the Respondent had been dishonest. I did not have sufficient evidence before me to make a finding of dishonesty. In relation to the allegation regarding

letters that the Claimant's case was weak, these letters were not said to be in the Hearing Bundle. However, it was not unusual to write to another party highlighting the weaknesses in their case. Since the most significant part of the Claimant's claim (disability discrimination) had been dismissed, this was a further factor I took into account in determining that this conduct was not unreasonable.

43. On the basis that there was no finding of unreasonable behaviour, I dismissed the application for costs.

Employment Judge Volkmer
Dated: 15 August 2024