EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Mitchell	**v**	Morrison Energy Services Ltd

Heard at: Bury St Edmunds **On:** 19, 20, 21, 22, 23 August 2024

Before: Employment Judge K J Palmer

Members: Mr R Allan and Mrs A Bray

Appearances
For the Claimants: In person
For the Respondent: Mr S Davies (counsel – unregistered)

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondents between April 2006 and 5 May 2023 when he resigned without notice. Originally employed as a project manager and since August of 2021, the Claimant was employed as a contracts manager which still included some responsibility for project managing.

2. The Claimant issued this claim on 14 August 2023 following early conciliation between 5 May 2023, the day of the resignation and 15 May 2023.

3. Initially, the Claimant pursued a variety of claims including claims in disability discrimination, the question of whether the Claimant was a disabled person for the purposes of section 6 was dealt with as a preliminary issue at the commencement of this trial and a separate Judgment was given in those terms and the Tribunal found that the Claimant was not a disabled person for the purposes of section 6 and accordingly the Claimant's claims in disability discrimination fell away and were dismissed.

4. The parties arrived on the first day of this trial with some unresolved applications which had been made to the Watford Administration but which had not, sadly, been dealt with prior to the commencement of this hearing. The first of those was an application by the Respondents for strike out. Accordingly that was heard by the Tribunal and was rejected and a

decision was given in those terms. There were also two outstanding applications for witness orders but due to the difficulty and the likely relevance of those witnesses, both parties withdrew their application for witness orders and the Tribunal was not called upon to make a determination on those applications.

5. So when we got started all that remained was the Claimant's claim for constructive unfair dismissal and this was set out pursuant to a Preliminary Hearing conducted by CVP by way of a Case Management discussion that took place before Employment Judge S Moore, sitting alone on 15 March 2024. Judge Moore set out the terms of the unfair constructive dismissal case. The Claimant is relying upon the implied term of trust and confidence, namely, the Respondent's duty not to behave in a way calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent without reasonable and proper cause for doing so and the implied duty to take reasonable and practical steps to provide the Claimant with a safe system of work.

6. The Claimant relied on treatment by the Respondent and this was largely unparticularised in the summary of EJ Moore but the treatment relied upon was the subjecting of the Claimant to an excessive workload, providing insufficient support and failing to satisfactorily address the concerns raised by the Claimant and/or other members of staff regarding the same.

7. When asked about what the acts or omissions upon which the Claimant relied and which the Claimant says caused him to resign, the Claimant says it was being issued with the outcome of his grievance on 24 April 2023 and the fact that that outcome did not uphold the majority of his complaints.

8. Further down the list of issues Judge Moore does invisage the possibility that the Claimant may pursue what is known as a 'last straw case' namely that there were acts which were part of a course of conduct conducting several acts and or omissions which, viewed cumulatively, amount to a breach of the implied term above.

9. We had a very helpful bundle in front of us running to some 499 pages, we heard from three witnesses for the Claimant, from the Claimant himself, from a Mr Newman and from a Miss Bailey. For the Respondents we heard from five witnesses, Mr Murray, Mr Burrows, Mr Bailey, Miss Cockhill and Mr Winch. Mr Winch dealt with the grievance. This hearing took place over the course of five days.

10. The Claimant started work as a project manager and in August 2020 he was promoted to contracts manager. This involved continuing to do the projects manager job in part and this is where the Claimant's difficulties seemed to have commenced. He had difficulty with the workload over the course of the next year and was signed off sick with stress in the summer of 2021 and we had a report before us that identified that the symptoms that he had were consistent with depression. He ultimately returned to work and continued to work until September 2022 when he had a serious depressive episode which saw him off sick until January 2023. During that time, in December 2022, the Respondents, in accordance with their Absence Management Policy, arranged for the Claimant to see an

occupational therapist. The report, which was produced in December 2022, recommended a phased return to work. It also opined that the Claimant was not likely to be disabled for the purposes of the Equality Act 2010.

11. Pursuant to that the Respondents arranged two welfare meetings, one in November on the 24th and another one on 8 December. Ultimately the Claimant did return to work in January 2023. When the Claimant returned the Tribunal accepts that the Claimant had been advised by Mr Brezzle, the Union Official, and clearly seemed to be in combative mode, asserting his legal rights as he then saw them.

12. The Claimant was and remains particularly exercised by the fact that previous concerns about his performance originally flagged by his then line manager, Christ McGill, who ceased to be his line manager on 1 December 2022, were mentioned during the course of the Welfare meetings. There then followed a series of email exchanges which the Claimant asked repeatedly in January, whether this performance issue would be addressed under the appropriate policy. His new line manager, by then who was Mike Murray, avoided this point whilst still responding to those emails and there was a flurry of exchanges. Finally, however, on 27 January, Mr Murray indicated that any issues about performance would not be addressed until the Claimant was back in work full time. The Tribunal regards this as entirely appropriate as no doubt the respondents would have set themselves up for huge criticism had they done what the Claimant's seem to be asking for and addressed his performance issues immediately after his return from illness and during the phased return to work period, implemented pursuant to the occupational health report recommendations.

13. It is important to remember that in employment tribunals the Tribunal is usually faced with competing evidence which conflicts with each other. The Tribunal has to conduct a weighing and balancing exercise, taking into account the evidence that it has heard and often has to determine which of the conflicting evidence it prefers. This does not mean that in rejecting one side's evidence it regards those witnesses as having told lies. The civil test for determining evidence is on the balance of probability and that is 51% in favour against 49% so the margins can be very fine when the Tribunal has to make a determination where there is a conflict of evidence as to whose evidence it prefers but the Tribunal nevertheless has to go through that exercise and it is a balancing and weighing exercise which the Tribunal conducts and comes to a conclusion on the balance of probability.

14. Here, we find that the Claimant's evidence was faltering, particularly when he was asked the reasons for his resignation or when he decided definitively to take a new job that he had been offered on 1 March 2023.

15. He had first engaged with a potential new employer and had interviewed on 9 February 2023. He was offered a new job on better terms on 1 March and he accepted it on 7 March, yet, at that time, he said nothing to the Respondents and gave no notice to the Respondents at any point, ultimately abruptly resigning on 5 May 2023 and starting his new job on

the next working day on 9 May 2023, despite at that time being signed off sick from the end of March.

16. His evidence was initially unclear and he intimated that although he had formally accepted the job in March he would have been happy to simply not turn up and stay at the Respondent's, had the Respondents resolved the issues that the Claimant raised in his grievance on 22 February 2023. When pressed by Mr Davies and also by me, he admitted that as at 21 March, when he told the occupational therapist, the Respondent's had arranged for him to see on his last sign off with them, that he was moving to another job and he accepted, that by this time, he had definitively decided to go and would not be staying at the Respondent's. This he then subsequently expressed in the grievance meeting a couple of days later which led to without prejudice discussions that took place in early April.

17. The upshot of this, is of course, that the outcome of the grievance decision on 24 April, being the principal or one of the principal breaches upon which the Claimant had indicated to Judge Moore that he relied and that he had resigned in reliance upon, could not have played any part in his decision to resign. Therefore, this is entirely contrary to what he told Employment Judge Moore at the Preliminary Hearing on 15 March 2024 and entirely contrary to his position at the start of this trial. This has led the Tribunal to treat the Claimant's evidence with some caution. On the balance of probability we consider that at the very latest the Claimant made his mind up to resign and to leave the Respondents was by 7 March when he accepted formally the new job with Ipsom. Quite possibly he had made his mind up before that. Certainly, nothing that occurred after 7 March can have played any part in his decision to resign, despite the fact that he waited another two months to actually do so. Therefore, the principal breach he says he relied upon, being the outcome of a grievance on 24 April, cannot be the case.

18. The Claimant, also during the course of these proceedings, has fleshed out the breaches he seeks to rely upon considerably beyond that which was recorded in the summary of EJ Moore. The Respondents have generously not complained and the Tribunal is also prepared to accept this fleshing out as the issues are essentially those that were subsequently raised in the grievance on 22 February. The Claimant relies upon the 8 December meeting as a breach upon which he says he relies and had initially suggested that the 24 November welfare meeting also amounted to a breach but subsequently, during the giving of evidence, changed his mind. He also considers that the Respondents had failed to implement their own policies although he is vague when pushed about detail. He suggests that the application of the Absence Management Policy, the Capability Policy, the Return to Work Policy and the Dignity at Work Policy have all been defective. These policies are guidelines and they are not to be slavishly followed in a tick box fashion in every case. They are not contractually bound to the Claimant's contract so they are not contractual policies and minor derogations from such policies cannot be unreasonable by the Respondents. We consider that in the provision of medical assistance, occupational health referral and in the implementation of those principal recommendations of those medical professionals and in pursuing both welfare meetings and back to work meetings the Respondents have

complied with the substance of those policies.

19. Whilst not part of the issues in terms, the Claimant has also complained that there is a breach in that the recommendations of the OH report were not followed. The fact is that they were followed with some minor adjustments and a phased return to work was implemented. We also accept the Respondent's position that the workload assigned to the Claimant upon his return in January 2023 was commensurate with those recommendations and the duties of the Respondents to allow the Claimant a phased return to work at that time. We do not consider that it was in any way unreasonable that Mick Murray did not specifically respond to the Claimant's request concerning the performance issues until 27 January as this was in the midst of other exchanges and was only a delay of 12 days.

The evidence of Mr Newman

20. We heard from two witnesses for the Claimant and two others produced witness statements but failed to attend. As explained at the time, the practice of the Tribunals is to add very little weight to statements of witnesses who produce statements but who fail to attend to be cross examined on them.

21. We do not consider the evidence of Miss Bailey to be of any real relevance to the issues to be determined by this tribunal. We accept entirely that the Claimant was from time to time finding the work challenging and, of course, in September 2022, went off sick with a major depressive episode. No one disputes that and no one disputes the reality and genuineness of the Claimant's feelings about how he says he was treated and that there is some justification for his feelings. It is clear, however, that there was pressure on all employees to perform and clearly since Covid, business had become busier and rather less well resourced.

22. Mr Newman gave evidence that he had been told by Mr Murray that it was Mr Murray's intention to load the Claimant up with work to either break him or make him leave. This allegedly ocurred in a phone call between the two on 11 January 2023. He then goes on to say that he passed this information on to the Claimant on 9 February 2023. Incidentally, on the same day the Claimant was interviewing for his new job at Ipsom.

23. Initially under oath, he confirmed that he had been disciplined by telephone call but when pressed by the Claimant under re-examination, said it was a face to face meeting. Mr Murray says that he has no recollection of that conversation with Mr Newman and also denied ever making such a comment.

24. Whilst the Claimant made much of this as being a breach at this trial and suggested that this was an effective cause of his resignation, he had not really raised it previously in terms. One might have expected the Claimant to be specific about this in his explanation to EJ Moore on 15 March 2024, yet there is no mention of it at all in the summary of the PH. There is also no mention in terms of specifics at any point until we got to this trial.

25. The Claimant, in his grievance letter of 22 February 2023, suggests that he had been loaded up to fail or break, the very words that Mr Newman

gives in his evidence yet the grievance makes no mention of the fact that the Claimant was actually told by Mr Newman that Mr Murray had allegedly used these words. This seems odd.

26. Moreover, the words 'loaded up' seem to be something of a favourite of the Claimant's who used them in his email of 6 January, some one month before Mr Newman claims he told the Claimant about what Mr Murray had allegedly said.

27. This and the other points we mention above about the Claimant's evidence, lead us to treat Mr Newman's testimony, in conjunction with the Claimant's, with some degree of caution. On that basis and on the balance of probability, we find it likely that Mr Murray did not use those words. Even if he did, we cannot find any evidence that is before us that he put them into practice. We consider that on balance, Mr Murray and the Respondents did all that could reasonably be expected to smooth the way for the Claimant's phased return. That is not to say that the Claimant did not find the work upon his return difficult and not to, in any way, belittle or decry the fact that the Claimant had undoubtedly suffered illness and had difficulty coping.

THE LAW

28. Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employers conduct. This form of dismissal is referred to as a constructive dismissal. The leading case in this area remains the case of Western Excavating ECC Ltd v Sharpe [1978] ICR221 Court of Appeal where Lord Denning ruled that for an employers conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. The burden of proof is on the Claimant to prove that. As Lord Denning put it, 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.

29. Helpfully, Lord Denning went on to establish that there are three things that an individual pursuing a claim for constructive dismissal must establish before the Tribunal. They are as follows:

29.1. That there was a fundamental breach of contract on the part of the employer.

29.2. That the employer's breach caused the employee to resign.

29.3. The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

30. In Western Excavating v Sharpe, the Court of Appeal expressly rejected

the argument that section 91(1)(c) introduces a concept of reasonable behaviour by employers entering contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in the authority of Bournemouth University Higher Education Corporation v Buckland [2010] ICR908, another Court of Appeal case. The Court of Appeal upheld the decision of the EAT but the question of whether the employers conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

31. Dealing with the question of the resignation and how closely or otherwise it is tied to any breach which the Tribunal finds, there is clear authority that the resignation must be due to the repudiatory breach. The resignation can be for a variety of reasons but the breach must be an effective case of the resignation, it doesn't have to be the effective cause and I am grateful to Mr Davies for his summation of the law and the case of Malik is often referred to as a refinement of the principles of Western Excavating v Sharpe. Malik v BCCI [1997] ICR606 and Brighton and Hove City Council, the EAT case 0240/06 tells us that to demonstrate a breach the Claimant must establish that the Respondent, without reasonable and proper cause, acted in a manner, either calculated or likely to destroy or seriously undermine the implied term of trust and confidence and this is an objective test.

CONCLUSIONS

32. The Claimant relies on section 95 and relies on the implied term of trust and confidence as the term, he says, was breached. The burden of proof is on the Claimant to show that there was behaviour on behalf of the employers, the Respondents, that amounted to a repudiatory breach going to the root of the contract. He also then has to show that that was an effective cause of the resignation and that he didn't wait too long to resign in reliance upon it. It is a high hurdle. Unreasonable behaviour by the employer is not sufficient to constitute a repudiatory breach. The acts relied upon have to amount, either individually or collectively, to a repudiatory breach. Mere unreasonableness of those acts is insufficient. We do not accept that on the balance of probability and for the reasons that we have given, that Mr Murray made the alleged comment about the Claimant to Mr Newman. Therefore, that cannot be a breach or be part of a series of events that constitutes a breach. Nothing in either the meeting of 24 November or 8 December can constitute a breach or be part of a series of events which constitutes a breach. None of the exchanges in the email chain in January 2023 between the Claimant and the Respondent can constitute a breach or be part of a series of events that constitutes a fundamental breach. There was no mis-application of the policies at the Respondents sufficient to constitute a breach or be part of a series of events that constituted a breach.

33. The workload that the Claimant was given on his return during the phased return cannot constitute a breach or be part of a series of events that constituted a breach. There is insufficient evidence to suggest that a lack of support by the Respondents amounted to such a breach or that there

was a failure to heed concerns raised by others regarding the Claimant and that that constituted a breach.

34. The Claimant, in any event, did not rely on anything that happened after 7 March in his decision to resign. The events that post dated 7 March played no part in that decision, on his own evidence, and that includes the grievance outcome. Even if that outcome was an effective cause of a resignation we do not find that any part of that process was sufficiently flawed to constitute a repudiatory breach or part of a series of breaches that, if taken together, could constitute such a breach.

35. That process was not perfect as conducted by Mr Walsh but it certainly would not have amounted to anything approaching such a breach for the reasons, therefore that I have set out, the Claimant's claim for constructive unfair dismissal must fail, it does so and we dismiss it.

Approved by:

Employment Judge K J Palmer

Date: 7 March 2025

Judgment sent to the parties on

11 March 2025

For the Tribunal office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/