EMPLOYMENT TRIBUNALS

Claimant: Mr M Margiotta

Respondent: James Andrew Residential Ltd

Heard at: London (South) Employment Tribunal, by video-link
On: 7 & 8 January 2025

Before: Employment Judge E Macdonald

Appearances
For the Claimant: Mr Margiotta (litigant in person)
For the Respondent: Mr J Brotherton (non-practising solicitor)

REASONS

Background

1. The decision in this matter was given orally to the parties on 8 January 2025. The Tribunal found that the complaint of constructive unfair dismissal was not-well-founded and dismissed the claim. A judgment to that effect was sent to the parties on 10 January 2025. On 16 January 2025 the Claimant requested written reasons. These are those reasons.

The hearing

2. I heard evidence from the Claimant himself and from Mr Evans Brandford, senior property manager. I also considered a written statement from Ms Caroline Bannon, a property manager, but placed little weight on its contents as the maker of the statement had not attended to confirm the truth of the statement and be cross-examined on its contents. I also received a bundle of documents. The Claimant had not prepared a witness statement, but in the absence of a witness statement he confirmed the truth of certain pages in the hearing bundle which set out his position, and he was cross-examined accordingly.

3. I made the following findings of fact on the balance of probabilities, having

regard to the evidence in the round.

Facts

4. The Claimant worked for James Andrew Residential Limited, a residential property management and concierge service at Mary Datcher House, from 13 July 2014 through to 22 December 2023. ACAS Early Conciliation ran from 4 January to 15 February 2024.

5. On 4 March 2024 the Tribunal received a form ET1 whereby the Claimant brought a complaint of constructive unfair dismissal. The claim was classified as one of dismissal for having exercised a statutory right. It was not clear from the Form ET1 or the attachment to the Form ET1 what the statutory right in question might be. However, that point was not material. The issue in the case is whether the Claimant was dismissed. If the Claimant was dismissed, then the likelihood would be that the dismissal would be unfair.

6. Over the time that the Claimant worked for the Respondent his duties changed, such that his job description in due course did not reflect the work which he was in fact undertaking. For example, when the Claimant first started work there was no cleaner attending the site; later, the Respondent engaged a cleaner and the Claimant's work shifted to supervising the cleaner on site, although the Claimant would also undertake various tasks from time to time such as picking up fish and chip papers which had blown onto the site or been discarded.

7. Throughout the Claimant's employment, there was growing dissatisfaction on the part of the tenant's association both with the Claimant and with the Respondent, although the Claimant persevered: he loved his job and enjoyed looking after his tenants. He was line managed by Ms Caroline Bannon.

8. In June or July 2023 Mr Brandford was asked to help Ms Bannon at Mary Datcher House where the Claimant worked. He met with the Claimant in June 2023, and recalled the Claimant saying that he expected that the job roles would change, and expressing a preference to be made redundant. The Claimant did not remember this discussion, but I find that Mr Brandford's memory is likely to be correct. It is supported by the fact that the Claimant did in fact want to be made redundant; he thought that he deserved a redundancy payment, and indeed there were documents in the Bundle which expressly referred to a redundancy payment. This was also supported by the Claimant's oral evidence: he hoped that he would be made redundant; he did not want to work for the company which was due to take over the running of Mary Datcher House, but he wanted to be there to do the handover.

9. The Claimant would only have been made redundant if his role were to be eliminated, and this was not certain, at any rate not at any point before the Claimant's employment ended. The Claimant said, and I accept, that the resident's association did not really want what he was providing, and what the Respondent wanted the Claimant to do; rather, the resident's association – and indeed the Respondent – would have preferred a "caretaker / handyman"

role.

10. On 14 August 2023 there was a proposal pursuant to s 20 Landlord and Tenant Act 1985 – i.e. the first step in a consultation which might have impacted on residents' service charges above £250 per leaseholder – in which the possibility of the Claimant being made redundant was canvassed. However, the Claimant did not become aware of this until much later, nor did it amount (as the Claimant suggested) to Mr Brandford offering to "sack" the Claimant. It was an understandable proposal being put forward to the residents' association in light of the residents' association having expressed a wish to save money.

11. By 11 October 2023 Mr Brandford had asked the Claimant whether his job description had changed. The Claimant had produced an updated job description at the request of Carolien Brannon, which included, for example, reference to Appleford House. The Claimant's evidence, which I accept, is that his job had, over time, become more administrative rather than hands-on. For example, he spent half a day on Friday afternoons working from home in order to enable him to undertake such tasks.

12. On 17 October 2023 the Claimant's own record was that the tenant's WhatsApp group was full of complaints; the tenants had been complaining about the lift, mould, the state of the carpet, issues with bin doors and bins, flashing lights, etc. The Claimant's record states ". . . I have no answers . . ."

13. On 18 October 2023 the Claimant was regrettably subjected to verbal abuse by the chair of the tenants' association. I do not need to cite the record of that interaction in full. No action was taken by the Respondent. Mr Brandford's oral explanation as to why nothing was done is not, in my view, credible or consistent with his written evidence: his evidence was, variously, that nothing had been done because there had been no formal report; that there had been a formal report, but that he was not aware of this report; that he was aware of the report (which had been provided by email) but did not know why nothing had been done; and that (in his witness statement) he was informed of the incident.

14. The Claimant subsequently raised the issue by an oral complaint to his line manager, Ms Bannon, and also raised the issue in writing. This, Mr Brotherton quite rightly accepted, amounted to raising a grievance.

15. On 10 November 2023 the Claimant was invited by Mr Brandford to an "expectations and promoting performance" meeting. The Claimant described this as a disciplinary meeting and queried why it needed to be formal. However, a clear explanation was given for why a formal meeting was appropriate. It was clearly a reasonable management instruction. The Claimant was not entitled simply to refuse to attend; any employee who refused to attend such a meeting would reasonably expect to be subject to disciplinary proceedings.

16. On 13 November 2023 the Claimant sent an e-mail saying:

"I feel I have been left with no other choice but to take retirement or endure

> six more months of accusations and having to prove myself . . . I also know that if I'm [TUPE'd] over to another Managing agent nothing would change. They would still make my life hell."

17. I find that the Claimant's decision to take retirement was prompted by the invitation to attend a meeting issued by Mr Brandford on 10 November 2023, and that the decision had been made by 13 November 2023 at the latest. I make that finding bearing in mind the Claimant's suggestion that the trigger for his resignation was that the Respondent had not offered an alternative chair for the meeting; from the Claimant's perspective, it was Mr Brandford who had caused the abusive interactions from a tenant, and the Claimant did not believe that Mr Brandford was impartial.

18. By this point, no action had been taken in relation to the Claimant's grievance.

19. By 16 November 2023, the Claimant's position was clear: he would no longer be working for the Respondent.

20. On 17 November 2023 the Claimant received an e-mail from Mr Brandford which described the purpose of the meeting and said "I note the content of your email, we can discuss your points without prejudice as part of the PIP meeting". I find that this was an offer to discuss what the Claimant had raised in his email of 13 November 2023, and that the "points" to which Mr Brandford referred included the Claimant's complaint about having been subjected to abusive behaviour.

21. On 18 November 2023 the Claimant tendered his resignation. He described this as a "retirement" rather than a resignation, but it was in plain terms a resignation.

22. In a later email on 20 November 2023 the Claimant complained that ". . . you [this is a reference to Mr Brandford] do not address a very serious issue of aggression and abuse towards me . . . I made it quite clear I wanted to take retirement because of the way I'm being treated . . . " and ". . . I do not want to work with the present tenants association".

23. Mr Brandford replied on 23 November 2023 asking the Claimant to discuss his resignation before he would accept it.

24. In response, on 24 November 2023 the Claimant wrote saying "JAR have shown their insensitivity by asking me to have a meeting with the very person that has in my opinion caused me to leave and also suggested sacking me . . . " The Claimant declined to meet with Mr Brandford,

Law

25. The starting point is the words of the statute.

26. The Employment Rights Act 1996 provides insofar as is material as follows:

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

[. . .]

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . , only if)—

[. . .]

(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.

27. **Kaur v Leeds Teaching Hospitals NHS Trust [2018] WLR 268** sets out the test which the Tribunal applies to cases of constructive unfair dismissal where the claimant relies on a "last straw":

> What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?
>
> Has the employee done anything to suggest that they have accepted (or affirmed) the contract since that act?
>
> If not, was that act (or omission) by itself a repudiatory breach of contract (i.e. of sufficient importance to justify resignation)?
>
> If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the employee's contract by showing that all trust and confidence had been destroyed? If it was, there is no need for any separate consideration of a possible previous affirmation.
>
> Did the employee resign in response (or partly in response) to that breach?

28. An innocuous act cannot be a final straw: **Waltham Forest v Omilaju [2004] EWCA Civ 1493**

29. An employer must reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance: **W A Goold (Pearmak) Ltd**

v McConnell and anor [1995] IRLR 516

30. It is an implied term in employment contracts that the employer will not conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence between the parties: **Malik v Bank of Credit and commerce International SA [1997] UKHL 23.**

31. It is an error to assume that the last event in time is the "last straw". The Tribunal will also need to consider whether the Respondent's earlier conduct in itself amounts to a fundamental breach of contract which has not been affirmed and which contributes to the employee's resignation: **Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19**

32. For a constructive dismissal claim to succeed, the employee must establish that the Respondent committed a repudiatory breach of contract – whether cumulatively (**Kaur**) or separately (**Williams**), which the employee goes on to accept by resigning, thereby bringing the contract to an end.

Issues & conclusions

33. For reasons which will become apparent, I need to consider both the 5-step test in *Kaur* and the guidance in **Williams**.

What was the most recent act or omission on the part of the employer which the employee says caused, or triggered the resignation?

34. The invitation sent on 10 November 2023 to meet with Mr Brandford is a key document. The relevant features of this invitation are that a) it was a formal meeting b) the Respondent did not put forward anyone else to chair the meeting and c) the Claimant did not consider that Mr Brandford was impartial. I reach that conclusion because it is clear that the decision to resign or retire had crystallised as of 13 November 2023 for the reasons set out above, and the decision remained crystallised as of 17 November 2023 immediately before the decision to resign.

Did the employee affirm the contract?

35. No: he resigned a little over a week after the invitation.

If not, was that act or omission by itself a repudiatory breach of contract?

36. No. It was a reasonable management instruction. Mr Brandford by virtue of his seniority was an appropriate person to meet.

If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the employee's contract by showing that all trust and confidence had been destroyed? If it was, there is no need for any separate consideration of a possible previous affirmation

37. No. It was, in my judgment, wholly innocuous. It would have been an opportunity for the Claimant to have discussed the situation with Mr Brandford and said, in terms, "my job description is out of date", or "the tenants' demands are not reasonable", or "the Residents' Association is trying to get me to leave", or "the problems are largely attributable to the Respondent".

38. Applying the five-step test in **Kaur** leads to the conclusion that there was no dismissal.

39. However I also go on to consider **Williams**, which reminds me that (quoting from the judgment in **Williams)**:

> If the most recent conduct was not capable of contributing something to a breach of the *Malik* term, then the tribunal might need to go on to consider whether the earlier conduct itself entailed a breach, had not since been affirmed, and had contributed to the decision to resign. So long as there had been conduct which amounted to a fundamental breach, the right to resign in response to it had not been lost, and the employee had resigned at least partly in response to it, constructive dismissal was made out even if other, more recent, conduct had also contributed to the decision

40. I have given careful thought to the fact that the Claimant raised a grievance in October 2023 which was not addressed. Mr Brotherton submitted that this did not give rise to breach of contract, because although there is an obligation to deal with grievances reasonably promptly, insufficient time had elapsed.

41. There could, in my view, be a breach if the employer says "I have received your grievance but I do not propose to do anything about it". There would be no need to wait for time to elapse because the employer would have expressed a clear intention to ignore the grievance: this would, in legal terms, be an anticipatory breach of contract.

42. I therefore go on to consider the possibility that the Respondent may have demonstrated, by its conduct, an intention to ignore the grievance.

43. I have considerable sympathy for the Claimant's position. He had been subjected to unacceptable conduct by a member of the tenant's association. He had reported it to his line manager, and therefore to his employer, who had taken no action (although he describes Ms Bannon as being sympathetic). The Respondent has an anti-harassment policy. Although in my view it is strictly

aimed at employees, I consider it creates a clear expectation that the respondent will – quoting from the policy – "investigate all allegations of such behaviour". It was not investigated.

44. Therefore, at the point at which the Claimant decided to resign – 13 November 2023 – the situation was that he had raised the issue with his line manager who had taken no action. Mr Brandford also appears to have been made aware that the Claimant was unhappy. However the Claimant had not put anything in writing, on the evidence available, until 18 October 2023 and that was the *monthly* report. I find on balance that it would not have been provided to the Respondent until it was complete. The Respondent had not refused to address the contents of the monthly report.

45. Nor had the Claimant sought to raise a formal grievance. He could have, but did not, invoke the grievance policy in the handbook. This is not a situation where the Claimant did not have access to a means of redress: he could have escalated the matter through the grievance procedure. It is not a situation where the Respondent had *refused* to entertain a grievance, or indeed a case where the Respondent had entertained the grievance but decided not to uphold it.

46. Although Ms Bannon had not taken action, the issue could still have been discussed with Mr Brandford as per the invitation of 17 November. In my judgment, this did not amount to a refusal to consider a grievance, nor was the delay such as to amount to a breach of the implied term.

47. I do not accept that exploring the tenant's complaints or indeed taking them seriously would amount to a repudiatory breach of contract. Although the Respondent did engage with the tenants' complaints, there was no evidence that this was done uncritically. Mr Brandford clearly wanted to meet to discuss the issues being raised. It would be wrong to assume that he was pre-judging the outcome of any discussion. Mr Brandford's engagement with the tenants was conduct for which there was reasonable and proper cause: it was part of his work.

48. For the reasons set out above, in my judgment the Respondent had not breached the employment contract. There was no breach of the implied term of trust and confidence, and the trigger for the Claimant's resignation was a reasonable request to attend a meeting; that request was, in the language of **Omilaju**, "wholly innocuous". It follows that the Claimant was not dismissed within the meaning of s 95 Employment Rights Act 1996: the complaint of constructive unfair dismissal is therefore not well-founded, and is dismissed.

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Employment Judge **E Macdonald**

Date: **5th March 2025**

JUDGMENT SENT TO THE PARTIES ON

Date: **21st May 2025**

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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