



## EMPLOYMENT TRIBUNALS

Claimant

**Mr D Draper**

v

Respondent

**Broadley Group Ltd**

**Heard at: Leeds**

**On: 14 January 2019**

**Before: Employment Judge Knowles**

**Appearances:**

**For the Claimant: In person**

**For the Respondent: Mr P Crowe, Solicitor**

## RESERVED JUDGMENT

1. The Claimant's claim of constructive dismissal in breach of contract is well founded and succeeds.
2. The Claimant suffered no financial or other recoverable loss in law therefore no damages for breach of contract are award.

## RESERVED REASONS

### Issues

1. The Claimant claims that he has no choice but to resign from his employment due to the Respondent being in breach of the Claimant's express terms of employment, namely the work he was doing was not his contracted duties, or in the alternative that there was a culmination of events that caused him to resign.
2. The latter part of the Claimant's claim is one of a breach of the implied term of mutual trust and confidence.
3. The questions for me to determine are:
  - a. What was the conduct of the employer that is complained of?
  - b. Was an express term of the Claimant's contract breached?

- c. Did the employer have reasonable and proper cause for that conduct?
- d. Was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence?
- e. Did the Claimant leave because of the breach or because of some other unconnected reason?
- f. Did the Claimant delay in resigning, thereby waiving any breach and agreeing to vary the contract?

### **Evidence**

4. I heard evidence from the Claimant and from Mr T McEvoy who is the Respondent's Commercial Manager. The Respondent produced a bundle of documents (76 pages). References in this judgment to page numbers are to those in the Respondent's bundle.

### **Findings of fact**

5. I make the following findings of fact on the balance of probabilities. This is not a summary of the total evidence presented. These are my core findings related to the issues.
6. I found both the Claimant and Mr McEvoy credible and straightforward witnesses and appreciated their frank answers to questions in tribunal. There was little dispute between the parties on the facts and few questions for either witness in cross examination. The dispute between the parties is, in the main, whether the circumstances they describe amount to a constructive dismissal as claimed, or do not.
7. The Claimant commenced employment for the Respondent 9 January 2017 as a Joinery Manager. He was issued with a contract of employment (page 31).
8. The employment contract states that the Claimant's job title is joinery manager (clause 1), that his place of work is site based across the UK (clause 6), and that between one month and two years' service the contract may be terminated by either party giving to the other a week's notice (clause 24).
9. The employment contract also sets out that the Respondent reserves the right to vary the terms of employment contained in this Agreement (clause 33).
10. The contract is signed by the Claimant (page 34) and the Claimant acknowledges that this is the contract of employment that applied when he resigned.
11. The relevant background to the Claimant's resignation is that there had been some discussions between the Claimant and Respondent about his duties and role in Leeds and he had been sent on 27 April 2018 a job description headed "Joinery Manager" but later referring to "Bespoke Joinery Manager" which he

was happy with (pages 39-41). There is more than one reference to project management responsibilities in the job description.

12. On 11 June 2018 the Claimant was asked to meet Mr McEvoy. He did so. He was asked to move from the Leeds site to the site at Dewsbury. He agreed to move. He asked what his job title and role would be and was told that those matters would be settled later but he should do whatever is required. He asked how a selection had been made for the move between him and Mr Conway, Joinery Manager / Joinery Director also at Leeds, and was told a selection had not been made it was just happening. He told Mr McEvoy he did not wish to do project management. He reported for work in Dewsbury the following day.
13. The Claimant states that 8 weeks passed and he had no role profile and was unhappy with being asked to undertake project management duties. He asked to meet Mr McEvoy again and they met 27 July 2018. He told Mr McEvoy at that meeting that he felt it was unfair that he did not know what his job or role were, and that he felt he was being duties consistent of those of a project manager.
14. On 31 July 2018 the Claimant again asked what his role was and Mr McEvoy sent him a job description headed "Project Leader" (pages 53-56).
15. The Claimant downloaded the Respondent's grievance procedure and sent a grievance to the Respondent dated 7 August 2018 (pages 61-62). In the letter he states that his grievance is about his job role. He recites circumstances concerning his role.
16. On 8 August 2018 Mr McEvoy wrote an email to Mr Broadley raising "issues relating to Dean" and listing 10 instances of poor performance (page 63).
17. The Claimant received a telephone call from Mr G Broadley, Chairman of the Respondent. Mr Broadley told him he had the Claimant's letter in front of him and that HR had told him it could cost a lot of money. The Claimant stated that Mr Broadley's manner was aggressive but they concluded agreeing to meet the following day.
18. On 9 August 2018 the Claimant met Mr Broadley. Mr Broadley showed him a list of jobs that he alleged the Claimant had lost money on. The Claimant asked him why he was showing him this the day after he submitted his grievance. The Claimant told Mr Broadley his grievance needed addressing. They discussed why Mr Conway had remained Joinery Manager in Leeds and the Claimant asked for details of the selection process followed. Mr Boardley told the Claimant that he is Mr Broadley and did not to follow process. The Claimant states that the conversation took a downward turn and Mr Broadley became more aggressive and said "it seems to me our relationship has become untenable". The Claimant was not challenged on his account in evidence. Mr Broadley has not given evidence in tribunal.

19. Mr Broadley wrote to the Claimant a grievance outcome on 9 August 2018, page 65-66. The responses are stated to be without prejudice. The response does not engage with core points that the Claimant complained about. Many of the complaints are simply 'noted' in the response.
20. On 13 August 2018 the Claimant handed in one week's notice "due to documented events" to expire on the final working day that week, 17 August 2018.
21. The Claimant worked his notice period and receive pay for his notice period.
22. The Claimant again met Mr Broadley on his last day of work but Mr Broadley did not conclude any of the Claimant's complaints.
23. The Claimant's net earnings after ordinary deductions is £576.92 per week.
24. In answer to questions in tribunal the claimant confirmed that he began to keep an eye on alternative employment from 11 June 2018 and applied for a role during the week of 7 August 2018 (after submitting his grievance), and attended an interview on 8 or 9 August 2018. He secured an offer of employment with that other employer which he accepted 11 August 2018 and commenced work 28 August 2018. He left after 4 weeks.
25. The Claimant states that he suffered emotionally, his well-being deteriorated along with his health following the meeting 11 June 2018. He states that he suffered poor sleep and anxiety. He did visit his GP but only to have his blood pressure checked and it had raised. He has no medical evidence.

### **Submissions**

26. The Respondent submitted that the change in location to Dewsbury had been agreed and that the Claimant agreed that on termination of employment there had been discussions about a change in job title but he was still employed as Joinery Manager. The Respondent submitted that if there had been any variation to his contract then that is permitted under the variation clause in the contract, clause 33. The Claimant affirmed the role by working for the next 8 weeks without complaint. There was no breach of any express term in his contract.
27. In relation to trust and confidence, the Respondent submitted that the Project Manager role did not happen. The Claimant's grievance was answered. The Claimant was offered an appeal. He left not because of the problems he raises but to work elsewhere. In any event he was paid his notice and is not entitled to any damages.
28. The Claimant submitted that he loved his job in Leeds, loved the company, gave his best, but that no process was followed in moving him to Dewsbury, the Respondent did not follow any performance management process and

compiled performance concerns the day after he wrote his grievance, telling him the relationship was untenable. He had no option other than to resign.

## The Law

29. The principles of constructive dismissal have developed over many years and consequently there are many authorities that guide employment tribunals in determining these claims. Harvey on Industrial Relations and Employment Law puts the position as follows. 'In order for the employee to be able to claim constructive dismissal, four conditions must be met:
- (i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
  - (ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.
  - (iii) He must leave in response to the breach and not for some other, unconnected reason.
  - (iv) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.'
30. In this claim the claimant claims that the implied term of trust and confidence had been breached by the respondent. That term was refined by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, [1997] IRLR 462 as providing 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.' From *Mahmud* we note that if the breach is not discovered until after the employment ends, the employee could not rely upon this as a ground for terminating the contract (since he is unaware of it). We also note that this term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence. *Mahmud* therefore confirms the formulation applied earlier in the cases of *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, which was approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157.
31. In *Lewis* it was held that the breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In *London Borough of Waltham Forest v. Omilaju* [2005] IRLR 35, the Court of Appeal held that in order to result in a breach of the implied term of trust and confidence, a "final straw", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of

the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

32. In *Walker v. Josiah Wedgwood & Sons Ltd* [1978] IRLR 105, Mr Justice Arnold commented that 'there are circumstances which can very easily be envisaged in which the making of an unjustified complaint or the giving of an unjustified warning or, still more, series of warnings would be or could be a matter of which legitimate complaint could be made by a person who says that he has been constructively dismissed, particularly and most obviously if the case which he seeks to make is a case based on the view that those warnings were given not really with a view to improving his conduct and performance, but with a view to disheartening him and driving him out. In any case in which that sort of claim is made, it seems to us to be abundantly plain that nothing less than a full investigation of the merits of the warnings is required.'
33. The principles from *Mahmud and Woods* were recently confirmed in *GAB Robins (UK) Limited v. Triggs* [2007] EAT/0111/07/RN, from which it may be read that the three questions to be asked in a constructive dismissal case (in which the claimant relies upon the trust and confidence term) are:
  - (i) What was the conduct of the employer that is complained of?
  - (ii) Did the employer have reasonable and proper cause for that conduct?
  - (iii) Was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence?

## Conclusions

34. *Was an express term of the Claimant's contract breached?*
35. I do not consider that there was any breach of any express term in the contract of employment. The Claimant was employed as a Joinery Manager and discussions concerning the Project Leader role were ongoing. He accepts he was still employed as a Joinery Manager under the Job Profile at page 39, sub-headed *Bespoke Joinery Manager* and containing references to project management responsibilities. He had agreed the move to work from the Dewsbury site. The Claimant has not identified any written express term that has been breached by the Respondent.
36. *What was the conduct of the employer that is complained of?*

37. It appears clear on the evidence that the Claimant was unhappy with the amount of project management he was required to do in Dewsbury and remained dissatisfied that he was required to move not Mr Conway. When he raised the lack of clarity on his job role and how he had been selection the actions from the Respondent were to compile a list of poor performance allegations against him. When he queried the process that had been followed he was told the "relationship had become untenable" by the Respondent's Chairman. The grievance outcome was incomplete and did not engage with the matters he complained about. This is the conduct the Claimant is complaining about.
38. *Did the employer have reasonable and proper cause for that conduct?*
39. The Claimant had set out a complaint under the Respondent's disciplinary process and was met with poor performance allegations in return, was told the Respondent did not have to follow procedures in moving him, and was told by the Chairman that their relationship had become untenable. He then received a written grievance outcome which did not engage with many of his core complaints. The Respondent may have had performance concerns concerning the Claimant, and may have had good reason not to require Mr Conway to move to Dewsbury, but it has given no reasonable and proper cause for the high-handed manner in which the Respondent answered the Claimant's complaints.
40. *Was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence?*
41. In my conclusion the Chairman of the Respondent would more likely than not know that handling the Claimant in the manner described about would destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant. Even were I wrong on that, I have no hesitation in concluding that it was 'likely' too have that effect.
42. *Did the Claimant leave because of the breach or because of some other unconnected reason?*
43. In my conclusion the Claimant did not leave because of the job offer, the reason for resigning was the conduct he has described. It is widely accepted that seeking to maintain a livelihood by taking steps to find alternative employment will not automatically defeat a claim of constructive dismissal. In my conclusion in the balance of probabilities the reason for resignation was the conduct complained of and the seeking and securing of employment was simply another further response by the Claimant in addition to his resignation, it was not the cause of his resignation.
44. *Did the Claimant delay in resigning, thereby waiving any breach and agreeing to vary the contract?*
45. I do not consider that to be the case. The Claimant may rely on the circumstances beginning in June 2018 but is are significant contributing conduct

from the Respondent, particularly from the Respondent's Chairman, which appears to have occurred between 7 and 13 August 2018. The Claimant did not, in my conclusion, delay too long in handing in his resignation and is not to be taken to have affirmed Mr Broadley's conduct between 7 and 13 August 2018 by not resigning until 13 August 2018.

46. *Was the Claimant constructively dismissed?*
47. In the light of the above conclusions I conclude that the Claimant was constructively dismissed in breach of the implied term of trust and confidence.
48. *What damages are due to the Claimant?*
49. The starting point for damages for breach of contract is what damages are necessary to put the Claimant back in the position he would have been in had the Respondent complied with their obligations under the contract of employment. Financial awards of damages are therefore normally limited to the notice period, the period of time in which the Respondent could have lawfully terminated the contract.
50. The Claimant has accepted that he resigned on notice and was paid for working his notice period. In these circumstances I conclude that the Claimant suffered no losses from a financial perspective. The Respondent, had they terminated the contract lawfully on 13 August 2018, would have paid to him the same amount.
51. The Claimant put in his damages claim a request for a redundancy payment. He has not claimed a redundancy payment. Even if he had, he concedes there are no express terms concerning redundancy payments and therefore he would, under the statutory scheme, not be entitled to a redundancy payment having less than two years continuous employment.
52. The Claimant also put in his damages claim loss of employment rights. He stated he had been advised to. It seems probable that the person giving that advice was referring to the inclusion of a payment for loss of statutory rights in a claim of unfair dismissal. However, this is not a claim of unfair dismissal. The Claimant has not set out any employment rights he has lost. He may later have accrued rights such as ordinary unfair dismissal protection, the right to a redundancy pay and other rights at 2 years' service, but he would not have acquired such rights within the period in which the Respondent could lawfully have terminated his contract on 13 August 2018, i.e. one week's notice.
53. The Claimant has referred to anxiety, sleeplessness and an increase in his blood pressure but he has not referred to seeking assistance other than to attend the doctors for a blood pressure check. He has produced no medical evidence. I don't doubt that he found the conduct of the Respondent which caused the resignation distressing
54. However in *Addis v Gramophone Co Ltd* 1909 AC 488, HL, the House of Lords ruled that an employee who was wrongfully dismissed without notice could not recover damages to compensate him or her for the manner of the dismissal, for



his or her injured feelings, or for the loss he or she may sustain from the fact that the dismissal itself makes it more difficult to obtain fresh employment.

55. There are limited circumstances in which non-pecuniary loss can be claimed at all. But there are two reasons these do not assist the Claimant. Firstly, the conduct he has complained of forms the dismissal. Damages for non-pecuniary losses cannot be claimed in relation to the termination of employment or manner of termination. Secondly, the Claimant has referred to issues I conclude are hurt feelings and distress from the Respondent's conduct. There is no claim of or evidence of any psychiatric injury.
56. In all of the circumstances, I make no award of damages for breach of contract.

**Employment Judge Knowles**

Date 17 January 2019

Note

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.