EMPLOYMENT TRIBUNALS

Claimant: Mr P Brazier

Respondent: Red Top Ltd t/a Simon Marden Estate Agents

Heard at: **London South Employment Tribunal**

On: **28-29 November 2019**

Before: **Employment Judge Ferguson (sitting alone)**

Representation
Claimant: In person
Respondent: Mr S Bray (owner)

JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's complaint of unfair dismissal succeeds.

2. The Claimant's breach of contract claim fails and is dismissed.

3. A remedy hearing will take place at 10am on 13 March 2020. A notice of hearing and directions will be sent separately.

4. There shall be no reduction to the compensatory award pursuant to the principles in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503.

5. There shall be no reduction to the basic or compensatory awards pursuant to sections 122 or 123 of the Employment Rights Act 1996.

6. The compensatory award shall be increased by 25% pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.

7. The award to the Claimant shall be increased by four weeks' pay pursuant to section 38 of the Employment Act 2002.

REASONS

INTRODUCTION

1. By a claim form presented on 23 August 2018, following a period of early conciliation that began and ended on 16 August 2018, the Claimant brought complaints of constructive unfair dismissal and breach of contract. The Respondent defended the claim.

2. The issues to be determined were agreed at the start of the hearing as follows:

   Unfair dismissal

   2.1. Did the Respondent commit a repudiatory breach of contract, either by breaching an express term of the contract or the implied term of trust and confidence? The Claimant relies on the following conduct between 29 May and 1 June 2018:

      2.1.1. Changing the Claimant's job role, so he was no longer the valuer;

      2.1.2. Taking away the Claimant's car that he had been given for business and personal use and restricting him to the use of a "pool car" for business use only;

      2.1.3. Taking away the Claimant's company credit card.

   2.2. Did the Claimant resign in response to any fundamental breach found?

   2.3. In the event that the Claimant was dismissed, was that dismissal for a fair reason? The Respondent relies on capability and/or misconduct

   2.4. Did the Respondent act reasonably pursuant to s.98(4) of the Employment Rights Act 1996 ("ERA")?

   2.5. Should there be any reduction to the Claimant's compensation on the basis that he would have been dismissed in any event?

   2.6. Should there be any reduction to the basic or compensatory awards to reflect the Claimant's conduct (ss.122-123 ERA)?

   2.7. Should there be any adjustment to the compensatory award on the basis of an unreasonable failure to comply with the ACAS Code of Practice on discipline and grievance procedures?

   Breach of contract

   2.8. As at the effective date of termination of the employment contract, was the Respondent in breach of an agreement to pay the Claimant 30% of profits in the business for the years 2017 and 2018?

Failure to provide written statement

2.9. At the date of the claim form, was the Respondent in breach of the obligation in s.1 ERA to provide a written statement of particulars of employment?

3. I heard evidence from the Claimant and, on behalf of the Respondent, from Simon Bray and Kirsty Peyton-Lander. The Respondent also provided a signed statement from Jasmin Beal. She did not attend because, so I was told, she had a baby prematurely two weeks ago. I explained that her non-attendance may affect the weight that could be given to her statement. The Respondent did not wish to postpone the hearing.

FACTS

4. The Respondent is a company that forms part of a business trading as Simon Marden Estate Agents. The Respondent company, and the business as a whole, is owned solely by Simon Bray. Mr Bray operates the sales side of the business through the Respondent company. The Respondent employs around 5 members of staff.

5. The Claimant commenced employment with the Respondent as a valuer on 1 March 2014. There was no written contract of employment, but the email in which Mr Bray offered the position to the Claimant included the following:

> "As mentioned, I can offer you use of a car (the Peugeot 206 that I spoke about) which will be taxed and insured by me – I am happy for you to use this as your own although very occasionally I may need to borrow it back briefly as sometimes (very infrequently) the tow bar on the back proves to be handy!
>
> The deal is essentially £1500 net in your pocket (done officially) with quarterly bonuses based on how things are going. This can always be renegotiated if need be but to begin with, this is the way I'd like things to be, if ok with you."

6. In Mr Bray's witness statement he said that it was not part of the Claimant's employment package that he would receive a "company car". Referring to the offer email, he asserted that the employment contract "made provision only for the discretionary use of a pool car for work purposes, which was the Peugeot 206". That evidence is entirely at odds with the content of the email and Mr Bray ultimately accepted in his oral evidence that it was part of the agreement at the start of the Claimant's employment that the Claimant would be provided with a car for business and personal use. He could not explain why he had said otherwise in his witness statement.

7. I find that it was an express term of the contract of employment that the Claimant would be provided with a car for business and personal use, subject to the condition that Mr Bray may need to borrow it infrequently. Mr Bray referred to the fact that no P11D tax had been deducted from the Claimant's pay in respect of the car. That may be right, but it does not affect what was agreed unless it were suggested (which it is not) that the agreement is not

enforceable for illegality. I note that Mr Bray accepts that the Claimant did not always receive his payslips, and that the original salary was agreed as a net figure, so the Claimant is unlikely to have known what tax was being paid by the Respondent in respect of his employment.

8. Mr Bray accepts that he did not at any stage during the Claimant's employment provide him with a written statement of employment particulars pursuant to s.1 ERA. He accepted that this should have been done, but also noted that the Claimant had never requested it. The Claimant did not dispute that.

9. From September 2014 the Claimant's salary was increased to £35,000, which Mr Bray says amounted to a net increase of around £750 a month.

10. In April 2015 the Claimant and his wife began renting a house owned by Mr Bray.

11. In 2015 Kirsty Peyton-Lander commenced employment with Simon Marden Estate Agents as Lettings Manager. She is now a director of the company. It is not in dispute that she has been provided with a car for business and personal use since around September 2015. The car she uses is owned/ leased by Mr Bray personally.

12. In October 2015 the Claimant's wife commenced employment with the Respondent as sales progressor/ administrator. Around the same time Mr Bray started to take a less active role in the business and the Claimant effectively took over the day to day running of the office, alongside his role as the main valuer. Mr Bray bought a Mercedes E350 for the Claimant's use. It is not in dispute that the Claimant used this car, as he had the Peugeot 206, for both business and personal use. Unlike the Peugeot, however, it was not owned/ leased by the Respondent company but by Mr Bray personally.

13. In December 2015 Mr Bray offered the Claimant a 30% share of the profits in the Respondent company, i.e. the sales side of the business. The Claimant agreed to this, but nothing was put in writing. The Claimant's evidence was that they had agreed to add up, at the end of the calendar year, all commission on sales, and to deduct staff and office costs. The final figure would then be split between him and Mr Bray 30/70 and would be paid to the Claimant early the following year. Mr Bray accepts that the agreement was along those lines, but says that his understanding was that it would be based on the profits shown in the company accounts, and would be based on the accounting year October to September. Once the profit was known, he would take an amount the equivalent of the Claimant's salary and then the rest would be split 70/30.

14. Part way through 2016 Mr Bray paid the Claimant £5,000 in respect of the profit share for that year. It was based on an estimate of the likely profits.

15. I do not accept that there was any concluded and enforceable agreement for the payment of profit share to the Claimant. There was nothing in writing and there was significant uncertainty as to the method of calculation of the profit and the timing of any payment. It was either an incomplete agreement or it was void for uncertainty.

16. There was an incident at the office Christmas party in 2016 involving the Claimant losing his temper at a karaoke bar and sending an offensive message about Mr Bray in a WhatsApp group chat. The Claimant took full responsibility for the incident afterwards and apologised to all concerned.

17. There was another dispute in February 2018 about the Claimant collecting Jasmin Beal on his way to work. It is apparent from text messages between Ms Beal and Ms Peyton-Lander around this time that relations between the Claimant and his wife and the rest of the office were not good.

18. In early 2018 the Claimant began looking for alternative employment. He told colleagues that he had an interview lined up, but said he did not attend because Mr Bray said he did not want him to leave. Neither of the parties gave detailed evidence about this and it is unnecessary to make any findings about it.

19. In March 2018 the Claimant's wife told colleagues that she had been offered another job. I did not hear any evidence from her and given that she has also brought Tribunal proceedings against the Respondent which are not concluded it was agreed that I should not make any detailed findings about the circumstances of her employment with the Respondent coming to an end.

20. In May 2018 the Claimant and his wife were due to go on holiday. The Claimant had not received any payments in respect of profit share since the payment in 2016. He texted Mr Bray to ask if he could be paid the "bonus" before taking the holiday. Mr Bray said this would not be possible because the books had not yet been finalised for the previous year. The Claimant asked if he could have an advance of £1,000 and Mr Bray refused.

21. The Claimant and his wife returned to the office after their holiday on 29 May 2018. On that day Mr Bray called the Claimant's wife into a meeting and, according to his evidence, "accepted her resignation". She left the building that day. Mr Bray's evidence is that she indicated at the time she would be bringing legal proceedings against him.

22. The Claimant said he was shocked that Mr Bray had terminated his wife's employment, but told Mr Bray it was between them and he did not want to be involved.

23. The Claimant and Mr Bray had a meeting later that day, in which Mr Bray told the Claimant that he did not want him and his wife living in his house any more. He also said he would be coming back into the business and would take over the valuations from the Claimant. He asked the Claimant to carry out the majority of viewings and deal with sales progression (which had been the Claimant's wife's role). Mr Bray's evidence to the Tribunal was that these changes were driven by staff shortages and concerns he had about how the business was running. At the same meeting Mr Bray told the Claimant he would no longer have the use of the Mercedes E350. He said he would provide an alternative, but that the Claimant would not be allowed to have his wife as a passenger.

24. The following day Mr Bray told the Claimant he could use the Peugeot as a "pool car", and this was for business use only. He gave the Claimant a letter to

sign confirming this. The Respondent has produced a letter in the bundle, bearing Mr Bray's and the Claimant's signatures, dated 30 May 2018 and with the heading "Company Car Policy at Simon Marden Estate Agents". The Claimant's evidence is that that letter is not the one that he signed on 30 May 2018 and he believes his signature has been forged. That is obviously a serious allegation and I would not be able to make a finding without very clear evidence, even if I were to see the original, that the signature has been forged. The copy in the bundle states:

> "This is a short note to clarify what I have now verbally discussed with you. I have supplied you with a car purely to facilitate you being able to carry out office related appointments only. This car is for your sole use only, and it is for business purposes only. I'm also afraid to say that it is not for travelling to and from work. Furthermore, no other individual is to travel in the vehicle with you as this would contravene the company car policy at Simon Marden Estate Agents, not to mention the fact that it would invalidate the insurance which would unfortunately lead to me having to commence disciplinary proceedings.
>
> Just so you are aware, every member of staff that drives a car that is owned by me personally (or a company owned by me for that matter) will also be receiving this letter of clarification as to what is acceptable or not, in relation to the use of company owned vehicles.
>
> I would be grateful if you would sign below, to confirm you understand, and are accepting of, the above directive."

25. I consider it possible, and indeed the most likely explanation, that this is the letter that was given to the Claimant, but Mr Bray told the Claimant at the time that it related to the Peugeot. That is supported by a transcript of a meeting on 8 June which the Claimant covertly recorded, and in which the Claimant said "I appreciate everyone else is having to sign it because it does relate to the Peugeot and I know the Peugeot is a pool car, so, and I get that, however, am I not having any car at all, to, to get home with and to have personal use?"

26. Mr Bray's evidence is that the letter was sent to all staff who had the use of a car. He accepted, however, that Ms Peyton-Lander continued after this date to have the use of the car that he had provided, for business and personal use.

27. At a further meeting on or around 1 June 2018 Mr Bray asked the Claimant for the return of his company credit card.

28. On Sunday 3 June 2018 the Claimant wrote a lengthy email to Mr Bray complaining about his treatment since returning from holiday. He said:

> "Since Tuesday of last week, in spite of the inner trauma I am naturally going through, I have continued to carry out my responsibilities regarding the business to the best of my abilities. This includes carrying out after hours appointments and liaising with vendors and purchasers whilst I have been away from the office this weekend. Our last meeting was on Friday evening last week where we discussed my concerns regarding my position within the company. I am very pleased that you

> re-confirmed (as you had done on Wednesday of last week) that my loyalty, work ethic and dedication was without question, which is why am so concerned as to my current treatment by you, which includes as previously stated; telling me I am no longer the valuer and my roles are now the majority of viewings, vendor care, price reductions and sales progression; taking away my use (business and personal) of the Mercedes E350; asking for the return on my company credit card. During our meeting on Friday I did confirm to you that for some time I have felt more and more excluded regarding decisions that have been made for the business. This includes new operating systems, websites etc. However, in spite of this I have continued to carry out my roles. I feel that I am being pushed into a situation that is both unfair and unjust as I have never done anything to warrant this treatment. With regards to sales progression, as we are both aware this is a fundamental part of the business and is incredibly time consuming and labour intensive as it requires many calls and emails etc. on a daily basis. Whilst I am happy to carry out any task required, I fear that with the roles I am required to undertake I would not have the time to do this as effectively as I should do.
>
> …
>
> … I am deliberately being put into a position where my continued employment will become untenable."

29. On 4 June Mr Bray and the Claimant had a conversation in the car, which the Claimant covertly recorded. Nothing turns on the content of that conversation. It suffices to say that the Claimant reiterated the sentiment of his email of the previous day and Mr Bray explained his frustration at the Claimant's wife's actions and suggested that the Claimant ought to be persuading her to drop the matter.

30. On 7 June 2018 Mr Bray wrote to the Claimant about sick pay and car arrangements. He said,

> "Further to the document which you signed eight days ago on 30th May, I have also been advised that the pool car which you are currently driving (Peugeot 206 - Registration OY54 JZP) needs to remain (overnight each day) either on company premises or at my home address, which means that unfortunately, I will require you to return the key to me at the end of the next day that you are in the office. Alternatively, I will be happy to collect the car from your home address (where I assume it is currently parked) if this would be easier for you."

31. Mr Bray does not dispute that he also told the Claimant that in fact the car could *not* be left at the company premises overnight, so the Claimant had to use public transport to collect it from or drop it at Mr Bray's home or to travel to and from the office. Mr Bray's evidence was that this was because of advice from his accountant about the insurance on the Peugeot. He also said that he was advised staff should not be using cars loaned from him personally for business use. As already noted, it is not in dispute that Ms Peyton-Lander has continued to be provided with a car in this way.

32. Also on 7 June 2018 Mr Bray acknowledged the Claimant's email of 3 June, but said he would need time to respond properly. He said he would be in touch again as soon as he could.

33. On 8 June the Claimant and Mr Bray had a meeting in the office which, as already noted, the Claimant covertly recorded. During the meeting the Claimant complained about the removal of his car, and asked how he was meant to get to and from work. Mr Bray said he was "not obliged", and "if you had a facility… it doesn't mean you're entitled to facility forevermore". The Claimant asked for a reason and Mr Bray simply referred to the issue with the insurance on the Peugeot. He did not explain why another car could not be provided for the Claimant's use. The Claimant said he felt he was being bullied. He also complained about the company credit card being taken away and said that the issue with the car was making it impossible for him to do out of hours appointments. The Claimant said he felt it was constructive dismissal and that he was being pushed out of the business. Mr Bray accused the Claimant of threatening him. It is evident that the meeting ended with the parties on very bad terms.

34. Mr Bray says that he verbally invited the Claimant to a meeting to discuss his email of 3 June at some point between 7 and 20 June, but the Claimant declined and made an excuse as to why he could not make the time suggested. The Claimant disputes this. On the balance of probabilities I find that there was no such invitation. The transcript of 8 June meeting demonstrates that Mr Bray was reluctant to discuss any of the matters the Claimant was raising and the relationship was very poor. It also shows that the Claimant was very keen to get some answers to explain why Mr Bray had made the decisions he had, particularly about the car. Mr Bray's evidence on the issue is vague, not supported by anything in writing, and is inconsistent with both parties' behaviour at the relevant time.

35. On 20 June 2018 the Claimant wrote to Mr Bray in the following terms:

> "Dear Simon
>
> I am disappointed and dismayed that you have given me no response to my detailed email to you of the 3rd June in which I made it clear that I felt you were pushing me out of the business.
>
> With the fundamental change to my job role without my agreement, the removal of my company car along with asking me to return my company credit card without an explanation despite my numerous requests for one, the ridiculous requirement to use a pool car kept at your house (some distance from the office) and the consequent inevitable humiliation within the business, I have no option but to give you 4 week's notice of my resignation from your Company. My last working day will therefore be the 18th July.
>
> As set out in my email and this letter, I believe I have been constructively dismissed

> from the Company by you and I shall be taking legal advice in this respect. I also put you on notice that I am still owed my 30% profit share (from last year and also this year up to the 18th July 2018) which expect to receive in my termination payment.
>
> I had enjoyed working for you and believe I have done nothing to deserve the treatment I have received from you which has made it impossible for me to continue working for the Company."

36. The Claimant commenced employment with Crane & Co Estate Agents in July 2018. The Claimant's evidence was that he did not attend the interview for this position until after his resignation. His contract of employment states that his employment started on 19 July, but the Claimant says it was in fact 23 July. Mr Bray suggested that the real reason for the Claimant's resignation was the fact that he had secured this alternative employment. He put forward no evidence to counter the Claimant's evidence that the offer came during his notice period. On the whole I found the Claimant to be a credible witness and I accept his evidence that he had not been offered this position at the date he resigned.

THE LAW

37. Section 95(1)(c) of the ERA provides:

> **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.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

38. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

38.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

38.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

38.3. The employee must leave in response to the breach.

38.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

39. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

> "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."

40. Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

41. Sections 122-123 ERA provide, so far as relevant:

> **122 Basic award: reductions**
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> …
>
> (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.
>
> …
>
> **123 Compensatory award**
>
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> …
>
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

CONCLUSIONS

Unfair dismissal

42. Mr Bray's case in closing submissions was that these proceedings were premeditated by the Claimant in retaliation for Mr Bray's decision to evict the Claimant and his wife from the house, and that the covert recordings were an attempt by the Claimant to get Mr Bray to say something incriminating to support later proceedings. I do not accept that the proceedings were premeditated in this sense. The Claimant may well have been contemplating proceedings from as early as his email of 3 June, and he may have decided to covertly record meetings as potential evidence, but that does not mean that the

reason for his resignation was not genuine or that he does not have a valid claim of unfair dismissal.

43. I have found that it was an express term of the Claimant's contract that he be provided with a car for business and personal use. There can be no doubt that the Respondent breached that term by taking away the Mercedes and purporting to replace it with a "pool car", with all the restrictions that that entailed, plus the additional condition that it be parked overnight at Mr Bray's house. The letter of 30 May 2018 does not amount to the Claimant's agreement to vary his contract because it did not relate to the car that had been provided to the Claimant in the past. It says "I have supplied you with a car purely to facilitate you being able to carry out office related appointments only". That was not the position in respect of the Mercedes (or indeed the Peugeot originally). The letter can only be read as applying to the pool car. It is also not in dispute that Ms Peyton-Lander continued to use her car for personal use, despite having been given a copy of this letter. Even if it is right that the terms of the Peugeot insurance meant that it had to be parked at Mr Bray's home overnight, Mr Bray has never explained why that was the only car he would allow the Claimant to use after 29 May. It was a significant loss of benefit to the Claimant, both financially and in terms of his ability to do his job. I am satisfied that it amounted to a repudiatory breach of contract.

44. I am also satisfied that this breach was a significant cause of the Claimant's resignation. The Claimant complained about it from the moment he was informed and never received a satisfactory explanation. He said he felt he was being forced out, and he very shortly afterwards resigned, citing the car as one of the main reasons in the resignation letter. It is obvious that it would be a matter of serious concern to him because it affected his ability to get to work and to do his job. The fact that he resigned before having been offered employment elsewhere also supports the finding that the breach of contract was the reason for his resignation.

45. I therefore find that the Claimant was constructively dismissed. It is strictly unnecessary to consider whether the other matters amounted to breach of express terms or Mr Bray's conduct amounted a breach of the implied term of trust and confidence. For completeness, however, I should record that I would have found a breach of the implied term. It is doubtful, in the absence of a written contract or job description, that there was a breach of an express term as to job role or the provision of a company credit card, but even if there were no breach of an express term (including in relation to the car), I find Mr Bray's conduct was calculated to destroy the relationship of confidence and trust, without proper cause. His failure to provide any logical or justifiable explanation for the removal of the car suggests that there was an ulterior motive. I find that the relationship had deteriorated in recent months and he was angry with the Claimant for pushing the issue about the profit share and for "allowing" his wife to threaten legal proceedings. He decided to make the Claimant's life difficult to penalise him for that and in the hope that the Claimant would resign.

46. I do not therefore accept that the reason for the Claimant's dismissal was conduct or capability. The dismissal was unfair.

47. The Respondent has argued that the Claimant would have been fairly dismissed in any event. There are vague assertions about the Claimant's performance but no formal action had ever been taken against the Claimant and there is certainly nothing that would support a finding that there would have been grounds to dismiss him fairly.

48. As for contributory fault, I do not accept that there is anything in the Claimant's conduct that either contributed to his dismissal or would justify a reduction to his compensation. He reacted reasonably to Mr Bray suddenly and without explanation withdrawing a significant benefit under his contract.

49. Finally, on the issue of the ACAS Code, the Claimant's email of 3 June should have been treated as a grievance and I do not accept that Mr Bray sought to arrange a formal meeting to discuss it. That was an unreasonable failure to comply with paragraph 33 of the Code. In view of my findings above as to Mr Bray's motivation I consider it just and equitable to increase compensation to the Claimant by 25%.

Breach of contract

50. I have found that there was no concluded enforceable contract in respect of the profit share so this complaint cannot succeed. In any event the Respondent asserts that there was no profit in 2017 or 2018 and the Claimant has not produced any evidence to the contrary.

Failure to provide written statement of employment particulars

51. Mr Bray accepts that no such statement was provided. Given the length of the Claimant's employment I consider it appropriate to award the higher amount, namely 4 weeks' pay.

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Employment Judge Ferguson

Date: 21 January 2020