



EMPLOYMENT TRIBUNALS

Claimant: Mr Kevin Thorns
Respondent: Michael Sutton trading as St Margaret's Nursery
Heard at: Southampton ET (via CVP)
On: 3,4 January 2022
Before: Employment Judge Horder

Appearances
For the Claimant: In person
For the Respondent: In person

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. By agreement of both parties, the name of the Respondent shall be amended to and recorded as Michael Sutton trading as St Margaret's Nursery
2. The Claimant was constructively dismissed and his dismissal unfair.
3. Calculation of remedy, if not agreed, will be dealt with at a further hearing in accordance with case management directions issued separately.

REASONS

Preliminary Issues

1. Shortly before the start of the hearing on day 1, the Tribunal received communication from the Respondent Michael Sutton detailing the fact that he was feeling unwell and had had an anxiety attack. He wished to have his case resolved as soon as possible but enquired whether if the case was rescheduled he could create written submissions in case he was unwell again.

2. The Tribunal noted the comments made about disability by Mr Sutton at paragraph 9.1 of his ET3. The start of the hearing was delayed and the Tribunal clerk contacted Mr Sutton to find out more information, ask whether if the case was put back to start later today or tomorrow morning (the case was listed for 2 days) that would assist. In response to those enquiries Mr Sutton indicated that he wished to join the hearing and would try to participate. He indicated to the clerk that it may help if he did not have to give evidence first.
3. When the hearing started later that morning, the procedure and timetable was discussed. Mr Sutton was asked to and agreed to indicate when he would like to take breaks and also any other measures the Tribunal could take to assist his participation. It was agreed that the Tribunal would hear evidence from the Claimant first. Mr Sutton also asked to attend and participate via telephone rather than via video to assist his anxiety and to allow him to move around if necessary. There was no objection from the Claimant and the request was granted. Later on when giving his evidence Mr Sutton wanted to give evidence via video and participated in that way for the remainder of the hearing.
4. A list of issues was discussed and agreed as set out below. As confirmed in writing to the Tribunal on 23.8.22 (in response to the direction of EJ Gray), the Claimant's case is that he did resign but that he was constructively dismissed.
5. Mr Sutton then raised the issue of disclosure and the fact that he was concerned that the Claimant had failed to disclose all communications about him with other staff members namely Charlotte Falconer, Eleanor Stewart and Nick Cozens. He had previously raised this issue in correspondence with the Tribunal (see p.168-172). The Claimant responded that there was no such material outstanding.
6. The Tribunal was unable to identify any basis for making any order further order as to disclosure. However, it was agreed that if that changed during the evidence then the Tribunal would re-consider the issue. During the cross-examination of Eleanor Stewart, she did refer to messaging the Claimant on "probably two occasions" asking him if he was ok following what she perceived as critical communications from Mr Sutton in the Manager Group chat. Mr Sutton later made the point that only one such message had been disclosed by the Claimant. The Tribunal did not regard this as a deliberate disclosure failure by the Claimant. Ms Stewart's evidence was equivocal on this point and in any event if there were such messages they would not have assisted the Respondent.
7. it was also agreed by both parties during the hearing that the correct respondent is Michael Sutton trading as St Margaret's Nursery, rather than St Margaret's Nursery as listed in correspondence to and from the Tribunal. St Margaret's Nursery is not a Limited company nor a legal entity in its own right. Mr Sutton was named as the Respondent in the Claimant's ET1.

Claims and Issues

8. The Claimant, first began working for the Respondent, a relatively small retail plant nursery in March 2020.

9. By way of email dated 12.4.21 the Claimant resigned from his post as manager. His ET1 claim form dated 7.7.22 details that he did so because of “increasingly critical and attacking” social media messages sent by the Respondent’s owner, Micheal Sutton. In his oral evidence he expressed his concern about a number of issues, in particular i) critical messaging relating to his performance in a work chat group on 21.3.22, ii) the fact that a face to face meeting on 29.3.22 purported to resolve issues but similar messaging continued and iii) the contents of a private social media message on 11.4.22 in which he was accused of “telling falsehoods”, “being dishonest” and “telling lies about me [the Respondent] to the staff”. However, he regarded the 11.4.22 email, including the allegations of dishonesty together with other criticisms of him as being the event that amounted to a fundamental breach of contract.
10. In response to a Tribunal direction dated 22.8.22 by which EJ Gray sought to clarify the nature of the claim, the Claimant confirmed that his case was that he had no choice to resign and that he was constructively dismissed.
11. The Respondent’s case, set out in lengthy particulars attached to the ET3, is that the Claimant’s claims are wholly unfounded. The communication between him and the Claimant was necessary communication with his manager and/or a justified response and rebuttal to the Respondent’s own conduct.
12. It was discussed and agreed that the Tribunal would consider liability first and then, if necessary go on to consider any issues relating to compensation or remedy separately. In the event within the time allotted the Tribunal only considered and determined liability as set out in the below list of issues.
13. Further, there was no suggestion in the evidence from either party (either orally or written) that the Claimant had affirmed the contract prior to his resignation. As a result, that was not an issue necessary to include in the below list of issues.
14. The list of issues agreed between the parties (as amended at the start of the hearing with the agreement of both parties) was as follows:

List of Issues

1. Was an act or omission (or a series of acts or omissions) by the Respondent a cause of the Claimant’s resignation
2. Did the acts/omissions amount to a fundamental breach of contract in respect of the implied term of mutual trust and confidence. The Tribunal will need to decide:
 - 1.1.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.1.2 Whether it had reasonable and proper cause for doing so.
3. Was the breach so serious that the claimant was entitled to treat the contract as being at an end?

4. Did the Claimant resign because of the breach?

Evidence

15. The Tribunal was provided with an agreed bundle, totaling 175 pages. This was significantly in excess of the 100 page limit set down by the originally Case Management Order. Some of the pages were duplicates. In the context of a 2 day hearing that had a delayed start in which neither party were represented, the Tribunal proceeded with the agreed 175 page bundle rather than pausing to attempt to prune the bundle further.
16. The Claimant gave live evidence as did Eleanor Stewart, a former employee of the Respondent and Mr Sutton.
17. This case started later than scheduled on day 1 as a result of the issues set out above at paragraph 1. At the conclusion of evidence and submissions on the afternoon of day 2, the Tribunal announced that further time was required in order to reach a decision. As a result judgement was reserved and the parties informed that if the Claimant were to succeed, directions would be made for a further hearing to determine all issues relating to compensation and quantum.

Fact Finding

18. The following findings of fact were made on the balance of probabilities. Findings were limited to matters relevant to determine the key issues between the parties. The Tribunal was provided with a large volume of social media messages to consider. None of those messages are repeated in full but are attached at the end of this judgement in an appendix [Appendix 1] of the most significant messages referenced below. Page numbers set out below refer to the agreed trial bundle.
19. Both the parties suggested that the other had not told the truth about events leading to the Claimant's resignation. However, the Tribunal was unable to conclude that either the Claimant or Mr Sutton had been deliberately dishonest. Neither did either attempt to mislead the Tribunal. Instead, this is a case in which there was a large gulf in the parties' subjective perception and understanding of the same events.
20. The Respondent is a small family run plant nursery, owed by Pat Sutton (who is now mostly retired from day to day management) and her son Mr Sutton. The business is highly seasonal with almost 75% of revenue being generated in the Spring season between mid-March and mid-May.
21. The Claimant began work in March 2020. He worked alternate weekends and Tuesday through to Friday. There was a dispute about how and when he became the general manager of the nursery, albeit little turned on it. The Claimant says he started as a general worker, Mr Sutton that he started as a manager.
22. The fact that the parties had different perceptions of the Claimant's initial role was perhaps of little surprise given that Mr Sutton accepted in his evidence that none of his staff had written employment contracts, job descriptions or written terms and

conditions of their employment. Mr Sutton also, later in his evidence, accepted that there were no written grievance or disciplinary procedures.

23. During the summer of 2020 Mr Sutton began mostly working from home meaning that he was rarely physically present at the nursery. This was in large part due to issues relating to his anxiety. As a result, much of the communication between him and the Claimant (as well as with other employees) was via phone and via instant messaging via social media chat groups.
24. The evidence also demonstrates a gulf in perception and expectation between the Claimant and Respondent about what was and was not appropriate communication and management of staff by a business owner. The Tribunal finds that Mr Sutton had run his nursery in his own particular way for many years. He had high expectations of his staff and expected them to complete tasks as he would have done. Unfortunately, his expectations and instructions in respect of routine tasks (such as changing prices, displaying fertilizer and re-cladding a Polly-tunnel) were not always communicated clearly or fully understood. This was not aided by the fact that, through no fault of his own, Mr Sutton was rarely physically present on site.
25. By contrast, the Claimant had previously been employed in managerial positions within education and, as set out below, came to consider Mr Sutton's communication and criticism of his performance as unprofessional and inappropriate. The witness Eleanor Stewart commented that Mr Sutton "*ran St Margaret's more like a family hobby rather than a professional business*". Whilst the Tribunal disagreed that that Mr Sutton considered the business a hobby, the lack of any clear understanding of job roles and absence of any written policies or procedures contributed to the events that followed.
26. There were a number of social media chat groups that Mr Sutton used to communicate with the Claimant and other employees. The one most relevant to the issues in this case has been referred to throughout the papers as "Manager Chat". There were five members of this group including Mr Sutton, the Claimant and two other employees who had some form of management responsibility namely Jasmin Head and Charlotte Falconer. The final member of the group was Eleanor Stewart who had been a Duty Manger but had left working for the Respondent in about October 2021.
27. There are extensive messages from the "Manager Chat" group included in the agreed bundle [pages 62-100]. They demonstrate that Mr Sutton was very actively involved in the running of the nursery regularly issuing instructions. He would use messages to allocate tasks and ask questions of his management staff. He was also not shy of expressing his views on how the business should be run and how tasks should have been completed. At times he used the group chat to challenge or question staff members and expressed concern about issues he was not pleased with [see for example messages on 3.2.22 at 3.22pm-3.52pm at p.62-63]. There are also examples of the Claimant sending Mr Sutton regular updates on events at the nursery [e.g. 25.2.22 at 7.57pm, 11.3.22 at 3.24pm p.72]

28. The tone of the messages was generally very informal. There are examples of jokes and swear words being used [e.g. 17.3.22 exchanged between Mr Sutton and the Claimant about a 'bulb lasagne'].

21.3.22 message exchange

29. On 21.3.22 there was an exchange of messages between Mr Sutton and the Claimant that started with Mr Sutton asking "*can you confirm where we are with price changes of nursery stock...*" [p.75]. The full exchange is set out in appendix 1. This referred back to what appears to have been a general request issued by Mr Sutton to effect price changes on a number of items of stock issued via message in the Manager Chat group on 18.2.22 [p.110]. In evidence both parties agreed that this would involve physically changing price labels on the items of stock as well as updating the Nursery's software programme that linked to the sales tills.

30. Following the Claimant's update of what he had done regarding this [at 10.50am – p.75], Mr Sutton's reply including the following "*...Online changes are done my end from imports etc. if you've added stuff manually then it will become listed twice. Doing this manually also takes time could be spent on other things. If there's any signage still waiting to be done you'll need to do it urgently as till prices will be updated within a couple of days*" [at 12.58am, p.76].

31. As part of his reply the Claimant explained how he had been updating price changes, including uploading relevant images and description details of products and saving them via drobox, adding "*I can promise you that I'm being as efficient as possible....*" [7.06pm p.76].

32. The response from Mr Sutton included the following: "*I'd deeply disagree that editing products online one at a time is efficient...*" and "*manual editing online will never be as fast as a local app. There should be very few situations where products are added or edited manually. And I'm certain that doing things manually is one of the reasons behind the ballooning wages bill*" [7.26pm, p.76].

33. The Claimant responded by questioning whether Mr Sutton would prefer him not to add any images before stating "*As for "ballooning" wages bills - these past months we have been only running 9 to 5pm, with no overtime? As you'd asked...? I am conscious that text and written messages are hard to gauge tone and emotion, however, twice now it seems to be being suggested that I or the team are twiddling our thumbs or not working as hard as could be hoped. Whilst perhaps I am misreading this, again I can assure you that we are working flat out and always attempt to complete tasks in the most efficient manner. As I say, I am conscious that written messages are difficult to judge tone and perhaps this is a misunderstanding*" [7.33, p.76]

34. Mr Sutton's response [8.16pm] referred back to the task of updating prices and product details before addressing the wages issue as follows: "*The wages bill is 30% up on pre-pandemic levels and almost 10% up on last year. Normal winter hours are 9-4. We've had more holiday and sick than usual but that's still a significant increase. Am I annoyed: yes. Not angry, but certainly grumpy. I try and create tools to life easier for you guys. And then I have to pay wages bills for stuff getting done the slow way. And*

fixing issues caused by not using the tools I've created. And then It's costing me money because price increases haven't been actioned. I'm not remotely suggesting people aren't working hard. I'm well aware that they are. But there's much to be said for working efficiently and not just working hard. Till and webstore is an area where some efficiency could save a lot of hard work."

35. The Claimant responded simply by saying *"Perhaps it isn't appropriate to continue such a discussion via messages"*. He then left the Manager's Chat group. The above exchange took place on Monday which was the Claimant's day off. Following the above exchange Eleanor Steward privately messaged the Claimant to ask him how he was commenting *"just seen Michael being Michael"* [p.100].

36. Mr Sutton clearly realised that the above exchange had upset the Claimant, asking him if he was ok by way of private message at 10.09 the next morning [p.94]. The Claimant responded at 12.22 the same day stating *"Hello Mike, I'm not really feeling OK to be honest. I think we would benefit from a face to face chat, to discuss things and so that we can sit at the PC also and I can then see where we can be more efficient."*

29.3.22 meeting

37. A face to face meeting took place on 29.3.22. No note or minute was taken and no one else was present. However, there was broad agreement between the parties as to the contents of that meeting and no significant challenge to the Claimant's account of it. Mr Sutton apologised for upsetting the Claimant. The Claimant set out that the criticism contained in the 21.3.22 exchange was unfounded and that he did not consider it to be professional to communicate such matters to him in that chat group which contained and could be read by other employees. Mr Sutton agreed to review and reflect on the messages he had sent. The Tribunal accepts the Claimant's description of that meeting as the two parties having a "perfectly good chat" and that he thought "that would be the end of it".

7.4.22 messages

38. On 7.4.22 Mr Sutton sent the Claimant a private message raising concern about the sale of fertilizer, ending the message with: *"...I find it very concerning to see the sales numbers dropping so significantly. As a reminder we need key items at/near the tills for impulse sales and eye-catching displays with large quantities of product for all key sellers. Slow selling lines need to be in the shop for protection from sun/damp etc."* [p.94]. This message attached sales data for fertiliser [p.95]

39. The following day at 5.12pm the Claimant sent a detailed response explaining what he had done that week. He included photographs of the Polly-tunnel and till fertiliser displays [p.84]. He added that he was away that coming weekend due to a family bereavement.

11.4.22 message

40. At 11.32am on 11.4.22 Mr Sutton sent the Claimant a private message [p.95 and p.123]. The 11.4.22 was a Monday, again the Claimant's day off. Within the agreed bundle prepared for this hearing Mr Sutton has titled the message 'Statement of

Concerns'. However that title or phrase did not appear in or before the message actually sent.

41. It started by dealing with Mr Sutton's review of the 21.3.22 messages that he knew had upset the Claimant and had been discussed in the face to face meeting of 29.3.22, stating as follows: *"I've reviewed the messages in the manager's chat which upset you. The only message I can see which could have caused offence was the last one, but by that time you were telling falsehoods about what you had programmed online. I'm obviously going to be upset when a person with high responsibility is being dishonest with me. It's clear you were upset and left the group because of the phrasing of the messages but because others could see your behaviour."*

"you were telling falsehoods"

42. During his evidence Mr Sutton explained the alleged "falsehoods" referred to above related to the Claimant's account with the 21.3.22 message exchange of what he had updated online with regards to images and descriptions of products as well as the extent to which he had updated and actioned necessary 2022 price changes.
43. The Tribunal finds that there was no deliberate dishonesty or falsehood from the Claimant about any such issues. Nor was there any objectively reasonable basis for either making or finding proved such an allegation against a senior staff member at that point. The Claimant had not been set any firm completion date for completing the task and in the 21.3.22 exchange does not purport to have completed it. Further, he had never before completed a large scale pricing change and he remained responsible for many other tasks. The Tribunal accepts the Claimant's evidence that he had updated certain items but still had other to do. Further, updating certain items was far from straightforward as the same product (i.e. patio stones) might come in many different sizes and specifications.
44. The difference between what the Claimant had done and what Mr Sutton had expected him to do is better described as a misunderstanding. Before concluding that the Claimant had been dishonest, the Respondent had not given him any prior warning of such an allegation nor an opportunity to respond to it. He had reached a conclusion without any form of objective investigation or enquiry.

"unresolved issues" and "deep disappointment"

45. In the next part of the message Mr Sutton referred to a number of "unresolved issues" that constituted tasks that he alleged the Claimant had not completed or not had completed properly namely 2022 price changes not being actioned, hiring not being done for the weekend vacancies and the fact that the front tunnel (used for housing plants) had not been prepared ready for recladding.
46. The issues of price changes has already been considered above.
47. As to the front tunnel, the Tribunal accepted the Claimant's evidence that he had been providing updates via message about the progress of the tunnel and that he had never before completed the final and important task of cladding it. Such

updates are evidenced by messages sent on 26.2.22 - p.68, 17.3.22 - p.73, 18.3.22 - p.75, 21.3.22 - p.76 and 8.4.22 - p.83-4. It was also agreed by both parties that it was the Respondent who would assist with the final task of recladding.

48. As to staffing, there had been previous discussion in the Group Chat about staffing levels. However, it was not confined to communication between the Claimant and Respondent and the Respondent did state on 3.2.22 that he could not “afford a new permanent weekday employee” [p.63]. In the same thread he stated he understood why there was “resistance to hiring teens” but that there was difficulty hiring anyone to work on a Sunday [p.63]. By contrast on 28.3.22 he referred to increasing the budget of hours worked for the Spring season, stating “I think we have capacity to do that without extra hiring. And we have Easter holiday coming up shortly which should bring us some of the weekend crew willing to work extra.” [p.94].
49. The Tribunal concludes that personnel criticism of the Claimant in respect of the tunnel or staffing issues was unjustified. It was also made with little if any further investigation or the opportunity for the Claimant to answer or explain what he had and had not been able to do.. The Tribunal further accepts that the issue of staffing was a complex and difficult one and that it was in any event the Respondent who was ultimately responsible for recruitment [as alleged in the email from the Claimant at p.125].

“telling lies about me to the staff”

50. There then followed a further serious allegation of dishonesty. Mr Sutton stated that “he had been told” that a private message regarding a drop in fertilizer sales had been represented as “rude and offensive” to other members of staff. Both parties agreed that the message referred to here was the message sent to the Claimant on 7.2.22 at 9.48 [p.94]. Mr Sutton then stated *“telling lies about me to the staff is very unprofessional, especially from someone in a management position”*.
51. In his oral evidence Mr Sutton explained that this information had come from his mother who he accepted did not always have “the full picture”. He had conducted no further investigation and not spoken to any staff members, nor had he given the Claimant an opportunity to respond. The point is illustrated by Mr Sutton’s oral evidence that *“whether [the telling lies about me] was correct or not or rumour, it upset me”*.
52. The Tribunal again finds that there was no basis for a conclusion that the Claimant had been telling lies about his employer to other staff members. The Claimant denied that he had described the message in that way and the Tribunal accepted his evidence on that point. However, even if the Tribunal were to be wrong about that, describing such a message as rude or offensive appears to be the expression of a subjective opinion rather than a deliberate lie.

“I’ve noticed a level of venom directed towards Jimmy and Mike Cox”

53. Mr Sutton then referred to “venom” directed against two suppliers “Jimmy and Mike Cox” by the Respondent. This referred to messages at p.137 of the bundle, dating from March and November 2021. The Tribunal observes that Mr Sutton responded to and engaged with these messages at the time and at no point either privately or within the group chat informed the Claimant that he thought such messages were inappropriate.

“As a result of these issues I will be expecting the following...”

54. The message then set a list of expectations for the Claimant, including a return to the Managers Chat Group and *“paying more attention to instructions/directions/advice”*. It ended by saying *“and needless to say I expect honesty and transparency and to be treated respectfully in all matters”*.

55. In his oral evidence Mr Sutton suggested that that message was his attempt at putting those issues to the Claimant. He was not telling him to leave his employment but rather raising issues he was not aware of. In hindsight he accepts that it “might have inflamed the situation”. He stated that he was aware that use of the word “lies” was inflammatory and that it could offend someone, that is why he used the word “falsehood”. However, his evidence ignored the fact that he did in fact use the word “lies” later on in that message. Further, if that message was an attempt to raise issues with the Claimant, it was unlikely to be regarded as such by any employee in receipt of such a message.

56. At paragraph 4.9 of his ET3 response the Respondent, referring to the above message, states that he had *“no choice but to move towards some form of disciplinary proceeding and sent the ‘statement of concerns’ message”*. In fact nowhere in that message is there any reference to any form or disciplinary process, nor of a set of allegations to which response was invited. Instead, conclusions were reached and performance expectations set without any form of fair procedure or process being even attempted.

57. Further, the Tribunal concludes that there was no basis at that point for any form of disciplinary action against the Claimant. The Claimant may not have completed tasks in the way in which Mr Sutton would have done so. However, he had a wide range of tasks and duties. He had previously communicated with Mr Sutton about all of the issues of concern reference in the 11.4.22 message (price changes, the hiring of staff and preparation of the front tunnel.) He had not been set any clear completion date in respect of any of those tasks and certain elements (i.e. recladding of the tunnel, final say on staffing) were beyond his control. There was no objective basis for making any adverse conclusions about the Claimant’s competence and capability or his performance. The Tribunal accepts that the Claimant had been attempting to perform his role in good faith and to the best of his ability. However, meeting Mr Sutton’s own subjective standards and expectations was not an easy task, hindered by the lack of clear task specifications, expectations and deadlines. The situation was further hindered by Mr Sutton rarely being physically on site.

58. The Tribunal also accepts that as a result of that 11.4.22 message the Claimant felt his position as Manager was untenable and that he had no option but to resign.

The Claimant had previously raised concern about what could be regarded as far milder and less inflammatory criticism included in the 21.3.22 exchange of messages. The Respondent had apologised at the face to face meeting on 29.3.22 and agreed to review the previous messages that had been sent. However, instead of moderating his tone or the content of future communications, the Respondent sent the 11.4.22 private message to the Claimant on a Monday (his day off) recording the fact that, amongst many other issues relating to his performance, he considered him to have lied both to him and to other staff members.

Events post 11.4.22 message

59. Minutes after sending the above message the Respondent re-added the Claimant to the Manager Chat Group together with another employee Nicky Cozens. Later that day he sent a detailed message to that group detailing how in his view the fertilizer should be displayed by the tills [p.77]. Mr Sutton would have known at the time that the Claimant did not wish to be added again to the chat Group following the 21.3.22 message exchange and subsequent meeting.
60. The Claimant responded to Mr Sutton's 11.4.22 message via email the following day [p.125]. He set out a detailed rebuttal of all points, reminding him that "I have previously told you I have been unhappy with your messages and said I feel it is unprofessional to berate people via messenger...". It ended by saying "*your latest message has become personal and I do not appreciate being called a liar (especially without any back up to such an accusation). I will not tolerate being spoken to in this manner. I therefore feel it necessary to step down as manager...*".
61. Both parties agreed that this message constituted the Claimant's resignation, notwithstanding the fact that the Claimant went on to request a return to being "on the general staff". The Claimant explained that he offered to return to another role because he had bills to pay and in a more junior role he would not have to have the same type of communication or contact with the Respondent.
62. The Respondent replied on 13.4.22 accepting his resignation and informing him that he had in fact been employed as a manager and that there was no alternative role for him. He was put on 'gardening leave' for the duration of his notice period [p.127].

Law

Constructive dismissal

63. A dismissal is defined by section 95 of the ERA and includes the employee terminating 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, section 95(1)(c). This is otherwise known as a constructive dismissal.
64. An employee will be entitled to terminate his contract without notice to his employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221.

65. Implied into all contracts of employment is an implied term of trust and confidence – see Courtauld Northern Textiles Ltd v Andrew 1979 IRLR 84 EAT.
66. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462, the House of Lords described that term as follows: *'The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'* The italicised word 'and' is thought to be a transcription error and should read 'or'.
67. In Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666 EAT Mr Justice Browne-Wilkinson described a breach of such an implied term in the following way *"The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it"*.
68. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
69. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)
70. An employer's motive for conduct causing an employees to resign is generally irrelevant. It makes no difference to whether or not there has been a fundamental breach that the employer did not intend to end the contract (see Bliss v South East Thames Regional Health Authority 1987 ICR 700, CA).
71. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).
72. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)
73. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract (United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

74. A claimant may resign because of a 'final straw'. The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence. See for example the judgement of Langstaff J in Lochuak v L B Sutton UKEAT/0197/14.

Conclusions

75. The Tribunal now applies the law to the facts to determine the key issues in this case.

Was an act or omission (or a series of acts or omissions) by the Respondent a cause of the Claimant's resignation [issue 1]

76. The primary cause of the Claimant's resignation was receipt of and the contents of the 11.4.22 message. There was little dispute about that from either side during the course of the hearing.
77. There were other events that upset and concerned the Claimant namely the criticism of him contained within the 21.3.22 email, being added back on to the Manager's Group Chat on 11.4.22 at 11.36 and what the Claimant perceived as a critical message re fertilizer sales on that group chat at 2.30pm the same day [p.77]. Whilst all of those factors may have contributed to his decision to resign and his sense of grievance against the Respondent, the 11.4.22 message was the dominant and main factor. Absent that message he would not have offered his resignation nor would he have felt unable to continue in his role.

Did the acts/omissions amount to a fundamental breach of contract in respect of the implied term of mutual trust and confidence? [issue 2]

78. The Tribunal reminds itself that this is an objective test and not whether the Claimant subjectively feels that such a breach has occurred. It is not sufficient that the Claimant subjectively feels there has been such a breach nor is it enough that the Respondent acted unreasonably in some regards. The bar is set higher than that.
79. Nevertheless, the Tribunal concludes that the sending of the 11.4.22 message amounts to a breach of the implied term of trust and confidence (issue 1.2, 1.2.1, 1.2.2).
80. The message contained serious allegations of dishonesty. None of those allegations had previously been put to the Claimant nor had they been raised with him in a neutral way inviting comment. Further, there had been no form of investigation or disciplinary procedure commenced by the Respondent. There was

no objective or proper basis upon which to conclude that the Claimant been dishonest to his employer or that he had been telling lies about Mr Sutton.

81. In addition to those serious allegations of dishonesty, the remainder of the message made a number of serious attacks on the Claimant's professionalism and capability, accusing him of failing to complete a number of tasks such as price changes, the hiring of staff and preparation of the front tunnel. Whilst the Claimant could have expected to be chased and asked for updates about such tasks, no set date had been set for completion of any such tasks and in previous message exchanges he had provided updates to Mr Sutton as to his progress. Rather than inviting comment from the Claimant or notifying him of an intent to initiate a form of performance management or disciplinary process, the overall tone of the email demonstrates that the Respondent had reached (and communicated to the Claimant) a highly adverse conclusion about his professionalism and performance.
82. The message also criticises the Claimant for his "venom" towards others, despite the Respondent having been party to those messages over 12 months ago and not having raised any issue about them either at the time or subsequently.
83. Whilst the Tribunal accepts it was not Mr Sutton's intention for that email to provoke the Claimant's resignation, sending such a message to a senior staff member was highly likely to, and in this case did, destroy the trust and confidence between the Claimant and Respondent. The content of that message, in the context of the Claimant having previously raised his concern about a far milder message sent on 21.3.22 and then there having been an apology and discussion on 29.3.22, was such that judged objectively, reasonably and sensibly, the Claimant could not have been expected to put up with it. His resignation as a result was an almost inevitable consequence.
84. Further, whilst Mr Sutton may have subjectively and honestly believed he was doing nothing wrong in sending such a message, there was no reasonable and proper cause for it for the reasons already set out above. There had been no proper investigation into the dishonesty allegations and nothing approaching an attempt at performance management in which clear expectations and goals had been communicated to the Claimant.
85. The Tribunal has not ignored the fact that upon his resignation, the Claimant requested to return to a more junior role that did not involve any element of management. That stance by the Claimant does not, in the Tribunal's view, detract from a finding that there had been a breach of the implied term of trust and confidence. As the Claimant explained in his evidence a return to a junior role would involve less communication with Mr Sutton, working below or being managed by someone else and little if any prospect of the same sort of communication as sent on 11.4.22. Further, he needed an income and because of his child care arrangements also needed a job where he had every other weekend free, something very difficult to achieve at most other plant/garden centre business.
86. For the avoidance of doubt, the Tribunal sets out that absent the 11.4.22 message referred to above, none of the Respondent's other behaviour would have, on its own or indeed cumulatively, have amounted to a fundamental breach of contract

under this heading. A level of discussion and implied criticism was inevitable and sometimes necessary when a business owner communicated with managerial staff whether in person or via messenger. Even if some, for example, the contents of the 21.3.22 messages or the 11.4.22 message relating solely to fertilizer [p.77] could be described as unprofessional or ill-advised they fall short of amounting to a fundamental breach and cannot be said to be likely or calculated to destroy the relationship of confidence and trust between employer and employee. It is the sending of and contents of the 11.4.22 that amount to a fundamental breach.

Was the breach so serious that the claimant was entitled to treat the contract as being at an end? [issue 3]

87. Yes. The breach included allegations and apparent conclusions about a senior employee's honesty, conduct and professionalism. The breach was sufficiently serious to entitle the Claimant to treat the contract as being at an end.

Did the Claimant resign because of the breach? [issue 4]

88. A repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach.
89. For the reasons already set out above the Tribunal finds that receipt of and the contents of the 11.4.22 message was the dominant and main factor the caused the Claimant's resignation.

Conclusion

90. For the above reasons the Claimant's of constructive dismissal succeeds.
91. The Tribunal has not yet considered the question of remedy and appropriate compensation. All issues relating to that will be dealt with at a further hearing if agreement cannot be reached between the parties. Directions for such a hearing have been issued in a separate case management order.

Employment Judge Horder
Date: 13 January 2023

Judgment & Reasons sent to the Parties: 18 January 2023

FOR THE TRIBUNAL OFFICE

Appendix 1 – key messages in full

21.3.22

Mike Mar 21, 2022, 12:46 PM

Can you confirm where we are with price changes of nursery stock? Most items were showing old price on ICR. I've updated everything on ICR, and I'm working to update online stock range and pricing.

Kevin sent Mar 21, 2022, 12:50 PM

The bedding 10.5s done, bedding packs done, patio 9cm done, and patio 13cm done. By done, I mean all signage in the Nursery changed, and products that I have populated online have been changed (eg all the patio stock for this season) Patio 10.5s are tomorrow's job for Nursery signage, but actually I don't think there are many products aside from winter 10.5 stock with signs that need changing.

Mike Mar 21, 2022, 12:58 PM

Online changes are done my end from imports etc. if you've added stuff manually then it will become listed twice. Doing this manually also takes time could be spent on other things. If there's any signage still waiting to be done you'll need to do it urgently as till prices will be updated within a couple of days.

Mike Mar 21, 2022, 6:02 PM

All 2022 stock from the plug orders file should now be on the shopify. Varieties no longer stocked have been archived along with a few duplicates and other anomalies. Pricing has been updated for 2022, including all 10.5 and plug fuchsias. New varieties are now ready for photos, descriptions and stock to be added. I tried to find and reuse items that had been entered by hand but probably missed a few where names has been shortened.

Kevin sent Mar 21, 2022, 7:06 PM

All sounds good. Thanks for finding the ones that I have already worked on and matching up. I've been making sure everything I've worked on and populated have the Colegrave images and the description details, and been saving these into the Dropbox and updating the images and descriptions on the signage as well, making sure we have the best presentation on the Web store to maintain sales. I can promise you that I'm being as efficient as possible - all of the updating of SKU and inventory, and listing it online can be done in the few seconds it takes to upload the images to a product also, which makes the whole process more speedy. Also, some of the high quality images that Jasmin has taken, such as generic plug images and generic images of a 13cm Geranium for example, make the whole process quicker and the online store easier for customers to understand what it is they are actually buying. Hopefully as the season continues online will continue to be a strong facet for us. There are always several customers that now refer to the online store, and have looked at it before they come into store to get ideas, so I think that is also adding to things.

Kevin sent Mar 21, 2022, 7:10 PM

Ps, got my car full of tools ready got operation tunnel repair to begin tomorrow!

Mike Mar 21, 2022, 7:26 PM

I'd deeply disagree that editing products online one at a time is efficient. Yes, there's a small number of tasks where it's the best/only option: descriptions, photos and inventory. But import files can update hundreds of products in seconds. They're also something that can be updated and reimported in future as prices change or products are removed from stock. The automated imports also ensure that there is consistency between tills and online. Manual editing is just plain error prone. And manual editing online will never be as fast as a local app. There should be very few situations where products are added or edited manually. And I'm certain that doing things manually is one of the reasons behind the ballooning wages bill.

Kevin sent Mar 21, 2022, 7:33 PM

The photos and the description is what I am talking about? That's the bit that I've been doing...? I'm a little unsure, but would you prefer me not to add the images? As for "ballooning" wages bills - these past months we have been only running 9 to 5pm, with no overtime? As you'd asked...? I am conscious that text and written messages are hard to gauge tone and emotion, however, twice now it seems to be being suggested that I or the team are twiddling our thumbs or not working as hard as could be hoped. Whilst perhaps I am misreading this, again I can assure you that we are working flat out and always attempt to complete tasks in the most efficient manner. As I say, I am conscious that written messages are difficult to judge tone and perhaps this is a misunderstanding.

...

Mike replied to you Mar 21, 2022, 8:16 PM

Original message:

The photos and the description is what I am talking about? That's the bi...

Like I say, descriptions and photos are best done online. But those are brand new products which have been added by hand. Plants are already in an import file because that's how we do the ordering. It's an easy job to add product codes and cut and paste a few details and everything updated with a few button pushes. Including updating the prices. For non plug file stuff (hardware etc) I don't recall seeing any import files, but maybe they're in a different folder. The wages bill is 30% up on pre-pandemic levels and almost 10% up on last year. Normal winter hours are 9-4. We've had more holiday and sick than usual but that's still a significant increase. Am I annoyed: yes. Not angry, but certainly grumpy. I try and create tools to life easier for you guys. And then I have to pay wages bills for stuff getting done the slow way. And fixing issues caused by not using the tools I've created. And then it's costing me money because price increases haven't been actioned. I'm not remotely suggesting people aren't working hard. I'm well aware that they are. But there's much to be said for working efficiently and not just working hard. Till and webstore is an area where some efficiency could save a lot of hard work.

Kevin sent Mar 21, 2022, 9:38 PM

Perhaps it isn't appropriate to continue such a discussion via messages.

Kevin sent Mar 21, 2022, 9:38 PM

Kevin left the group.

11.4.22 – key messages

Mike Apr 11, 2022, 11:32 AM

Hi Kevin, I've reviewed the messages in the manager's chat which upset you.

The only message I can see which could have caused offence was the last one, but by that time you were telling falsehoods about what you had programmed online. I'm obviously going to be upset when a person with high responsibility is being dishonest with me. It's clear you were upset and left the group not because of the phrasing of the messages but because others could see your behaviour.

The discussions around you being upset have, sadly, left the main issues unresolved:
* 2022 price changes not being actioned, even once I insisted they be done asap. * Hiring not being done for the weekend vacancies, leaving us at risk of serious staff shortages and a staff member that probably should have been let go. An issue which has been discussed repeatedly since last summer. * Front tunnel not prepared ready for recladding which will have serious implications for the spring bedding season.

I'm deeply disappointed that you have mostly dropped communications since withdrawing from the managers chat group. As we discussed at our last meeting I would like to see more communication. There is currently a lot which needs to be discussed as we begin the busy season.

I'm also told that my private message to you regarding the drop in fertilizer/pest control sales has been represented as 'rude' and 'offensive' to other members of staff. I sent the message privately as it was clear you were feeling sensitive after the previous exchange in managers chat. And I took great pains to word the message carefully so as not to offend. Telling lies about me to the staff is very unprofessional, especially from someone in a management position. If you feel a message is offensive the appropriate action would be to query that with the sender.

As you say, the emotion behind an online message is easily misunderstood. I would also recommend that you need to recalibrate what you consider offensive.

As a side note, I've noticed the level of venom directed towards Jimmy and Mike Cox, which is significantly higher than I feel either deserves. This may be an aspect of the same issue.

As a result of these issues I will be expecting the following: * The incomplete jobs raised above to be completed. I.e. Hiring and front tunnel preparation (I'm unclear of the status of the latter due to lack of communication). (Obviously Nicky and I have finished the repricing). * Improved communications. Which also includes: - As guidance, smaller, more frequent, more timely messages are much easier to digest and respond to on messenger than large ones. - A return to the managers chat group. (I shall also be adding Nicky to the group as she is now taking a more active role in many areas). - The ending of the use of the private/off domain (i.e gmail) email account. This looks unprofessional and hinders sharing and collaboration with external communications. I understand your phone copes badly with the app and website, but you have a PC available at work so that's a minor issue. * Pay more attention to instructions/directions/advice. E.g. the Christmas shed which should have been built

to be move-able but is now stuck occupying valuable outdoor sales area. This issue has probably affected other issues raised here. *

And, needless to say I expect honesty and transparency and to be treated respectfully in all matters. Mike

Kevin sent Apr 12, 2022, 8:40 AM

Hello, I have sent you an email response, to Mike@stmargs.co.uk

Email from Claimant to Respondent, 12th April 2022 'His Response'

Mike,

In response to your private Facebook message to me yesterday:

You said I was "telling falsehoods", what falsehoods and dishonesty are you referring to? Because I have NEVER been dishonest.

I was upset and left the group because:

I don't appreciate being told I'm not working efficiently, things are being done too slowly, and I'm costing you money; and generally being berated over a text message. As I said at the time it's unprofessional and if you are unhappy you should have arranged a meeting face to face to deal with it.

Being berated in a public forum.

Being part of a "managers chat" which has someone that no longer works for the company on there, a member of staff that is on long term sick and a member of staff that has stepped down from a manager's roll.

I actioned the 2022 price changes and messaged you periodically as they were being done (messages dated 01.03.2022, 09.03.2022, 21.03.2022), you put a thumbs up to the messages. On the 26.02.2022 we had a discussion about pricing and you told me it didn't have to all be done at once, but to do it bit by bit (e.g. by pot sizes), which gives the impression it's not that urgent. If you felt I was not actioning this quickly enough I would have expected you to tell me that.

Nicky has had no part in actioning the price increases, I did them.

I have been asking for more staff members since last summer, which you have repeatedly said no to. When you did say we needed more staff (which you again berated me for on 03.02.2022 even though I had been asking for more staff) I wrote up an advert, you checked it and ok'd it, the application forms came in and were sent to you (which you sat on for 3 weeks), you did the interviews, and you hired 3 people. I am not, nor have I ever been, responsible for hiring.

You mentioned a staff member that "probably should have been let go". I have no idea what or who you are talking about but regardless I am not in charge of firing. You are.

The front tunnel is prepped ready for you to come in and cover it. I have never done anything like this and don't really know what I'm doing, as I have told you. But I have followed your instructions; put the tape on in the worst affected areas and done the woodwork. The tape was put on in the dry, so dampness is not the issue. I have messaged/ spoke to you regarding the front tunnel 5 times (20.02.2022, 17.03.2022, 18.03.2022, 29.03.2022, 08.04.2022) as with

updates and queries. The only person in the nursery that knows what to do to fix this is you, and you haven't come in to fix/ or show me how to fix it.

I have not dropped communication, I have continued to update you and have sent you pictures as you requested.

The messages re the fertilizer have not been discussed with any staff any further than to say that we needed to do a display and put some near the tills as you have said sales are down. I have never told lies. I am more than happy to have a meeting with yourself and the member of staff that has been saying this.

I have previously told you I have been unhappy with your messages and have said that I feel it is unprofessional to berate people via messenger; this is not something that would ever be done in another workplace. And after saying that, you have again today taken to messenger to have a go and tell me all the things you are not happy with (and on my day off..... Again) I would recommend that you recalibrate what you think is an acceptable way of speaking to people.

I have no venom towards Jimmy and Mike Cox. I dealt with a difficult situation with Jimmy in Xmas 2020 (as instructed by you) and have not seen or heard from him since. I speak very positively with Mike Cox from time to time with no issues, and have seen him in the Nursery recently. I find it appalling that you have brought this up riding on the back of your messages to me dated 08.12.2020 and that Pat regularly tells the staff of Jimmy's Facebook posts in a derogatory manner and has told everyone in the nursery that she has sent Jean round to Jimmy's just last week to have a look at what he's selling!

How can I discontinue using the company Gmail account when it is on our website for customers to contact us on?! And if our email is listed as that on the website, don't you think it would be a little confusing to any customers/ companies to receive an email from an alternative e mail?

As a result of these issues I think it is clear that there is a massive communication problem, a hierarchical problem within the nursery (you tell me to do one thing, Pat tells me to do another, people on the managers chat that aren't managers) and a total lack of professionalism.

Your latest message has become personal and I do not appreciate being called a liar (especially without any back up to such an accusation). I will not tolerate being spoken to in this manner. I therefore feel it necessary to step down as manager and go back to being general staff on my original agreed 30 hours.

If you wish to discuss this further I am more than happy to, but not via messenger. You can call or come in.

Kevin

- END -