



EMPLOYMENT TRIBUNALS

Claimant: Mr C Dobbin

Respondent: Sefton Metropolitan Borough Council

HELD AT: Liverpool **ON:** 3 and 4 July 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mr S Pinder, Solicitor

Respondent: Mr T Kenward, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal fails and is dismissed.

REASONS

The Issues

1. The only issue before the Tribunal was one of constructive unfair dismissal. There were no other claims.

The Facts

2. Mr Dobbin was, until his resignation on 8 December 2016, employed by the respondent as Mayoral Attendant. His main area of work, although he had other things to do, was supporting the Mayor at any one time, and that included driving the Mayor to functions. This was not a 9-5 job. Mr Dobbin had to be in effect "on call". Mr Pimblett, his immediate manager, would arrange the claimant's work.

3. There was a casual worker who did a similar job to Mr Dobbin driving the Mayor when Mr Dobbin was not available because of sickness or holidays.

4. The claimant joined the respondent on 4 January 2012. Mr Pimblett was managed by Mr Pearce.

5. The claimant resigned on 8 December 2016. His resignation contained the reasons at that time which were:-

“The reason being for a long time now I have felt undervalued, insignificant and totally out of favour.”

6. The claimant's resignation was accepted by letter on 9 December 2016, a letter signed by Mr Pearce.

7. On 12 December 2016 Mr Dobbin wrote a two page letter setting out in more detail why he resigned. The claimant's overall suggestion with regard to his resignation was that over a period of time his managers, in his words “wanted him out”. He extends that allegation in his witness statement by suggesting:-

“Mr Pearce would sometimes look at me as if he did not want me there. It is difficult to put my finger on exactly what was happening, but he gave me a look of complete disdain. Mr Pimblett often put me under pressure and did not seem to recognise that I had periods of ill health and also that there were issues occurring in my family which caused me to be under stress.”

8. The claimant had a considerable period of time off work which caused Mr Pimblett concerns.

9. The claimant was required to work 36 hours a week. Those hours were mainly spent on driving duties for the Mayor but there were other things the claimant had to do. Because of the flexible nature of the work the claimant was asked not only to put in timesheets but also to clock in and clock out when working.

10. Over a period from September 2013 through to November 2016 the claimant was absent from work for various matters such as vomiting, stomach upset, chest infection, digestive intestinal problems, asthma, muscular pain and stress.

11. At any given time during the working year the claimant could owe many hours to the respondent. For example in July 2015 the hours owed were 51. However, over a yearly period those hours owing would more or less even out.

12. Mr Pimblett was a lenient manager but because of pressure from Mr Pearce, Mr Pimblett insisted that not only did Mr Dobbin complete timesheets but he also clocked in and clocked out so that a check could be made on his attendance.

13. On 31 July 2015 at a 1:1 meeting Mr Pimblett and the claimant discussed hours owing to the council, an improved commitment to service by the claimant and the organisation of other duties as and when required in order for the claimant to make up those hours owing to the respondent. At the end of that meeting Mr Pimblett made it clear to the claimant that towards the end of September he would be considering the situation again, especially with regard to the time off that the claimant had. Both Mr Pimblett and Mr Dobbin signed the record of that discussion.

14. Mr Dobbin had time off in October 2015 and it was recorded by Mr Pimblett that if there were further bouts of illness than Mr Dobbin would be referred to Occupational Health. Mr Pimblett had "back to work" interviews with the claimant after each bout of sickness.

15. By October 2015 Mr Pimblett had given to the claimant a job sheet breaking down individual tasks required of the claimant.

16. By November 2015 after discussions with Mr Pearce, Mr Pimblett had identified several additional duties within the Civil Attendance Service that Mr Dobbin could do. Mr Dobbin agreed to do that work.

17. On 26 November 2015 Mr Pimblett and the claimant had had another meeting. The details of that meeting were recorded in an email to Mr Dobbin and copied to Mr Pearce on 27 November 2015. They confirmed that the claimant's clock cards and hour sheets needed to be submitted by 12 noon every Monday, even if that Monday was a rest day.

18. Mr Dobbin was advised that if the standards set out in that email and the expectations were not met then disciplinary procedures would commence.

19. In February 2016 Mr Pimblett was still concerned about the claimant's attendance. An HR officer, Debbie Rayfield, advised that the claimant's sickness absence was not acceptable. Ms Rayfield told Mr Pimblett that the expected council's target for sickness was 4% of working time, whereas the claimant in the first year was 11.66% and over two years was 10.37%.

20. The issue from the claimant's perspective was that he felt that the car he was driving for the Mayor, which was a Nissan Leaf, was not appropriate. It was an electric car which in the winter caused difficulties because when the heating was put on the charge in the car would not last very long and the car's range was adversely affected. The claimant's practice was to turn the heating off to lengthen the range of the car. Consequently the inside became very cold.

21. Mr Pimblett arranged for the claimant to be seen by the Health Unit at Sefton Council (Occupational Health) and they noted that the claimant had been diagnosed in 2015 with asthma, and that the claimant himself was attributing that to driving the car in the winter months.

22. The report of the Occupational Health expert suggested that there were no particular duties the employee could not do. At the "back to work" meeting with the claimant on 3 March 2016 Mr Pimblett made it clear, as part of the sickness absence policy, that the next stage if things did not improve would be a formal hearing due to the claimant's high levels of sickness compared to the council's target.

23. Mr Pimblett and the claimant went through the details of the Occupational Health report. Mr Pimblett suggested various procedures that could be put in place to prevent any recurrence of difficult issues for the claimant, including the claimant arranging to heat the car for 30 minutes before taking the car off charge.

24. The claimant had difficulties at home at this time. His wife had been diagnosed with hypermobility syndrome. This meant that his help was needed to look after the children. The claimant arranged to take unpaid leave to deal with those family issues. On a number of occasions in March 2016 he took parental leave unpaid.

25. Because of other commitments he had himself, Mr Pimblett did not take up the claimant's poor attendance with the claimant. Ultimately Mr Pimblett was advised by HR that there was nothing that Mr Pimblett could do in relation to the sickness absence procedure because too long a period had elapsed since the last absence of the claimant.

26. In a meeting with the claimant on 29 September 2016 Mr Pimblett explained why there had been a delay with regard to dealing with his attendance. Mr Pimblett accepted the claimant's sickness record had improved greatly over the six months from February 2016 to September 2016. Therefore he told the claimant he would not be taking the claimant through any disciplinary or capability process but would be monitoring his sickness over the next six months.

27. On 5 November 2016 the claimant reported an accident that he had whilst using the jet wash on the Mayoral car. At his "back to work" interview on 23 November Mr Dobbin informed Mr Pimblett that his personal circumstances were starting to have an effect on his timekeeping and ability to be in work. Mr Pimblett informed the claimant that he felt that the current circumstances were not at the standard that he expected of the claimant. A date in January 2017 was fixed for the situation to be reviewed.

28. Mr Pimblett was now micromanaging the claimant and set out in an email to him on 25 November 2016 the jobs for the following weekend in priority order:

- (1) To get his hour sheets and clock cards in and up-to-date.
- (2) To do a full clean of the garage including brushing the floor and jet washing various areas.
- (3) A full valet, both inside and out, of the mayoral vehicle.
- (4) Draft a copy of the Southport booklet, which was a document that the claimant was preparing for the Borough.
- (5) Some newspapers needed to be tidied up.

29. On 2 December 2016 Mr Pearce became involved and noted that there were two matters which were of concern. Firstly Mr Dobbin's sickness absences and the continuing number of those absences, and secondly a potential disciplinary matter.

30. A report was prepared by Mr Pimblett which was not seen by the claimant until these proceedings. The thrust of the report from Mr Pimblett to HR and to Mr Pearce was that the claimant's sickness absence issues were starting to have a serious detrimental effect on the service delivery to the Mayor.

31. The claimant had been instructed in 2015 not to work from home as it was not possible to confirm what hours the claimant worked if he did so. Mr Pimblett referred to the jobs that he had asked the claimant to do over the weekend of 26 and 27 November 2016 as set out above. He referred in the report to a phone call he had with the claimant at 8.10 am on Monday 28 November when he, Mr Pimblett, was still at home himself, where the claimant told Mr Pimblett that he would not be in that day. He had a doctor's appointment for the Wednesday and the claimant told Mr Pimblett that he "can't cope with everything".

32. When Mr Pimblett got into work on that Monday he picked up the claimant's clock cards which he had left for the claimant to complete. The clock cards recorded that the claimant had worked from 3.23 pm until 6.41 pm on Saturday 26 November, and from 1.23 pm until 6.12 pm on Sunday 27 November. However, one of the claimant's colleagues, Trish Morgan, mentioned to Mr Pimblett that she had been in work herself on Sunday and had not seen the claimant working. When the CCTV footage was secured it showed that the claimant entered the building at 3.18 pm on Saturday 26 November and then left the building two minutes later. The claimant then returned at 6.35 pm and clocked off a minute later, leaving the building at 6:37 pm. The claimant did something similar on 27 November.

33. Mr Pimblett noticed that neither the Mayoral car nor garage had been cleaned as requested.

34. These events concerned the management and led up to the claimant resigning.

35. It was decided by Mr Pearce that the claimant would have to be taken through a disciplinary process. The claimant was absent from the office ill. His wife was now in hospital. Mr Pearce did not know that the claimant's wife was in hospital but attempted to ring the claimant on a number of occasions on 7 December.

36. Mr Pimblett was out of the office so Mr Pearce tried to contact the claimant around about 11.15 am. There was no answer and after trying on a couple of occasions, Mr Pearce then rang the claimant's wife's number only to find out that she was in hospital. He was apologetic, although he may have been terse with her because he was embarrassed. He said to her, and he regretted this, that he wanted to discuss with Mr Dobbin an issue with regard to gross misconduct and suspension.

37. He then rang the claimant's mobile phone at 11.25 am. Again there was no answer but at 11.40 am the claimant rang Mr Pearce and was told by Mr Pearce that an allegation had been made with regard to gross misconduct but no details were given. He was told there would be a precautionary suspension meeting on the next day at 3.30pm.

38. Although the claimant protested that he needed to look after his children, he agreed to go in the next day. Mr Pearce said to the claimant that the meeting would go ahead if Mr Dobbin did not attend, but if that happened he would get all the details in a letter.

39. At 11.50 am on 7 December the claimant telephone Mr Pearce and said that he was going to bring in a resignation letter. Mr Pearce attempted to dissuade Mr

Dobbin from doing that. Mr Dobbin was upset that Mr Pearce had rung his wife when his wife was in hospital. Mr Pearce apologised and at 1.00 pm that day, after speaking to Human Resources, he rang the claimant to ask him to reconsider his resignation and attend a meeting the next day. There was no answer to the phone call so he left a message.

40. 11 minutes later the claimant rang Mr Pearce and confirmed that he would be resigning and said, "I've had enough".

41. On 8 December Mr Dobbin attended at the office of Mr Pearce together with one of his children and produced the letter at page 133 of the bundle, the contents of which are set out above.

42. Neither Mr Pimblett nor Mr Pearce nor the claimant, knew what would have happened at any future disciplinary hearing.

43. Mr Dobbin was of the view that any disciplinary action in those circumstances did not require him to be suspended.

44. Mr Pearce, on the advice of HR, felt differently.

The Law

45. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

46. The judgment in the case of **Western Excavating (ECC) Limited v Sharp [1978] ICR 221 Court of Appeal** states for an employer's conduct to give rise to a constructive unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive unfair dismissal, namely:

- (1) That there was a fundamental breach of contract on the part of the employer;
- (2) The employer's breach caused the employee to resign; and
- (3) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

47. In order for an Employment Judge to deal with these matters he or she must identify the contractual term or terms, either express or implied, which have allegedly been breached. They must then go on to identify a fundamental breach of that contract on the part of the employer.

48. The parties agreed in their List of Issues that the implied term of trust and confidence was the term of the contract which had allegedly been breached by the respondent by various acts or omissions over a period of time which, the claimant says, cumulatively amounted to a fundamental breach.

49. In short, therefore, I must decide whether the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

50. If I find for the claimant in that way then the claimant is entitled to treat himself as discharged from any further performance of the contract. Furthermore if I find that the claimant is constructively dismissed I must then go on to consider whether the respondent has shown a reason for the dismissal and, if so, was the reason for dismissal a potentially fair one.

Conclusions

51. Applying that law to the facts of this case I concluded as follows.

52. There were no continuing breaches of the claimant's contract by the respondent. The claimant's managers were critical of him in the way that he performed his tasks, and before he resigned were on the cusp of taking him through a disciplinary process because they felt that over the weekend of 26 and 27 November 2016 the claimant had been less than honest in the way that he had allegedly performed his duties and attended at work.

53. Whether the respondent managers were right in their view is a matter for conjecture. However it was not unreasonable for those managers, in the light of what they knew at the time, to start a disciplinary process in order to see what transpired during the investigation.

54. The claimant, not unnaturally, did not want to be taken through that process. He also had real pressure at home in terms of looking after his children whilst his wife was in hospital. Generally he also had over a period of time, difficulties at home because of his wife's hypermobility syndrome. In short I find that the reason for his resignation was that things had got too much for the claimant and he decided to resign. The words he used to his managers when discussing those issues suggest as much.

55. In order to assist the claimant to understand why I have rejected his claim, however, I can add the following.

56. With regard to the state of the car, it was clear that the car was potentially not fit for purpose. However, Mr Pimblett, once he knew that there were difficulties with it and had an Occupational Health report in front of him in early 2016, quite properly arranged for the claimant to do his work in a different way and made suggestions as to how he could run the car so that he could keep warm. That, after all, was the claimant's main complaint. The issue over the car had largely resolved itself in mid 2016 especially as Mr Pimblett, in the face of the claimant's complaint, arranged for another car to be made available when the Leaf was not a suitable vehicle to use.

57. Moreover the respondent management cannot be criticised for looking at the claimant's attendance. The record shows that his attendance was poor. He also took time off in order to look after his children by taking unpaid leave. Mr Pimblett was the most lenient of managers and allowed the claimant time off in circumstances where

other managers would have refused. The concerns, set out in paragraph 19 above, were legitimate.

58. Due to Mr Pimblett's inertia the claimant was not taken to task as he perhaps should have been in early 2016 about his attendance and a proper process gone through. By the time Mr Pimblett got round to dealing with that issue Mr Dobbin's attendance had improved over the six months from February to September 2016. The claimant's accusation that Mr Pimblett put him under pressure over his attendance does not hold up.

59. Mr Pearce must be criticised for the way in which he dealt with the potential disciplinary process. It was wrong of him (and Mr Pearce accepted this) that he rang the claimant's wife whilst she was in hospital and discussed her husband's work issues with her. Although the claimant suggests that Mr Pearce knew his wife was in hospital, that was not the case. Mr Pimblett did not tell Mr Pearce that Mr Dobbin's wife might be going into hospital, and at the time when she went into hospital Mr Pearce did not know that she was there. However, having rung her he should not have given her any reason as to what he was trying to contact Mr Dobbin. Mr Pearce realised his mistake. However, that mistake by a manager was not sufficient for the claimant to mount a successful claim for constructive unfair dismissal. It is not a breach of contract. It was just poor judgment on Mr Pearce's behalf. Even if I am wrong that one act is not a fundamental breach of contract going to the heart of the relationship.

60. Furthermore, it was right that the claimant should be invited to a suspension hearing. Although the claimant now protests that he could not go into that meeting because he was looking after his children, at the time he did agree to attend. Nothing would actually have turned on him attending or not as the case may be because the meeting was one where the claimant and his manager would have discussed the suspension process and the reasons for suspension – a neutral act. Mr Pearce told Mr Dobbin that if he did not attend he would be given all the details in a letter with an explanation as to why he was being suspended. It may have been more appropriate for Mr Pearce to put Mr Dobbin's mind at rest and given him some of the details over the telephone, but again his failure to do that cannot be seen as a breach of contract.

61. Applying therefore the legal test to the facts of this case I concluded that there was no fundamental breach of contract on the part of the employer. At its highest poor management decisions were made which upset the claimant. More importantly, however, the employer's treatment of the claimant did not cause the claimant to resign. It was the prospect of him having to go through a disciplinary investigation, with the added worry of his wife in hospital and having to look after his children whilst she was in hospital which was the cause of the resignation. There is no issue with regard to affirmation of the contract because once the matters which caused Mr Dobbin to resign had occurred he resigned immediately.

62. This was not a case where there was a build up of pressure upon the claimant by management which culminated in a "last straw" incident. The treatment of Mr Dobbin by Mr Pimblett after receipt of the Occupational Health report in February 2016 had no connection to the concerns of management in late November 2016. In

any event, I find that Mr Pimblett's treatment of Mr Dobbin could be categorised as being benign rather than in any way blameworthy or aggressive.

63. Mr Dobbin suggests that the issue of whether he would be taken through a capability process for poor attendance was hanging over his head through 2016. However, on 3 March 2016, all that Mr Pimblett did was make it clear that if things did not improve there would have to be a formal hearing about the claimant's level of sickness. By the end of September 2016 when Mr Pimblett met with Mr Pearce again with regard to that issue Mr Pimblett was keen to point out to the claimant that as his attendance had improved from February through to September there would be no capability process taken against him. By the end of November 2016 it was Mr Dobbin who was telling Mr Pimblett that his personal circumstances were having an effect on his abilities at work. There was nothing wrong in Mr Pimblett pointing out to the claimant that Mr Dobbin's standard of work was not up to scratch and to then start micro-managing him. That was done in order to assist the claimant to get through the working week. Other than those issues nothing occurred in the claimant's working life during 2016 which comes close to showing that the respondent's managers did not intend to be bound by the essential terms of the contract.

64. There was a specific allegation that Mr Pearce looked at the claimant with "complete disdain" and that was a reason for him resigning. I did not find that that happened. I find that ultimately Mr Pearce was frustrated by the claimant's performance in the role and suspicious of what he did, work wise, over the weekend of 26/27 November 2016. Even if Mr Pearce did look at the claimant in that way that one act was not a fundamental breach of the claimant's contract going to the root of the employment relationship.

65. Finally, and for completeness, the mistakes of management that I have recited above do not cumulatively add up to a breach of the claimant's contract.

66. For all the above reasons, therefore, the claimant's claim is dismissed.

Employment Judge Robinson

Date 09-08-17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 August 2017

FOR THE TRIBUNAL OFFICE