



EMPLOYMENT TRIBUNALS

Claimant: Miss KL Davies

Respondent: Nelsons Insurance Brokers Limited

FINAL HEARING

Heard at: Nottingham

On: 17-18 July 2017

Before: Employment Judge Camp (sitting alone)

Appearances

For the claimant: Mr J Forrester, solicitor

For the respondent: Mr S O'Brien, counsel

JUDGMENT

The claimant was not dismissed and her claim therefore fails.

REASONS

1. These are the written version of the Reasons given orally on 18 July 2017.
2. The claimant, Kelly Louse Davies, resigned from her employment as the respondent's Sales Director on 8 September 2016. She alleges she was constructively dismissed and her one and only complaint before the employment tribunal is of unfair dismissal under sections 94, 95, 98 and 111 of the Employment Rights Act 1996 ("ERA").
3. The case is factually and legally straightforward. In terms of what happened little, if anything, relevant is in dispute. The facts are, though, rather unusual. The claimant's resignation did not follow any obvious falling-out between her and the respondent's Managing Director (Steve O'Flynn). Instead it followed: another employee, who I shall refer to as AB, effectively confessing to at least two potentially criminal assaults on video and not being sacked; the alleged destruction of evidence about this.
4. At the start of the hearing, I expressed my considerable concern to the parties and their representatives about the fact that neither the claimant nor Mr O'Flynn was sufficiently bothered by AB's conduct to report the matter to the police, even though they knew from press reports that the police were investigating at least one of the assaults. Similarly, it appears that



they did not share with the police the videos they had in their possession either, even after AB was arrested. I shall return to this later in these Reasons.

5. I am told that ultimately no action was taken against AB by the police. Whether action would have been taken and AB successfully prosecuted had the relevant video been passed to the police, I do not know. Even though he has been openly named in the evidence presented in public during this final hearing, I have chosen to conceal his identify in these Reasons. This is partly because it may still be possible for AB to be prosecuted and partly because he has had no role in these tribunal proceedings, which do not concern him directly, and so has had no opportunity to give an account of himself to me.
6. In this part of the hearing, I am dealing with liability only. The only live issue is: was the claimant dismissed? It is realistically conceded by the respondent that if she was dismissed, her dismissal would be unfair.
7. The claimant was dismissed if she resigned in response to a repudiatory or fundamental breach of her contract of employment by the respondent.
8. The claimant alleges a breach of the so-called 'trust and confidence' term. In other words, she alleges that the respondent, without reasonable and proper cause, behaved in a way calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Accordingly, the first subsidiary issue is: did the respondent behave in that way and do so without reasonable and proper cause? The only other subsidiary issue is: was any breach of the trust and confidence term one of the reasons the claimant resigned? On both subsidiary issues, the burden of proof is on the claimant.
9. In terms of the relevant law, this is substantially contained in the relevant legislation and in the issues as just set out. Dismissal includes an 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*": ERA section 95(1)(c). What this means was definitively decided by the Court of Appeal in Western Excavations v Sharp [1977] EWCA Civ 165, in the well-known passage beginning , "*If the employer is guilty of conduct which is a significant breach...*" and ending, "*He will be regarded as having elected to affirm the contract.*"
10. The respondent is no longer raising affirmation as a defence.
11. As already mentioned, the claimant relies, as the "*significant [a.k.a. fundamental or repudiatory] breach*", on a breach of the 'trust and confidence term'. Any breach of that term is repudiatory. This serves to highlight that it is a high-threshold test: "*destroy or seriously damage*" is the



wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

12. To further emphasise how grave things must be for there to be a breach of the trust and confidence term, or some other fundamental breach of the contract of employment, I note that a fundamental breach is one going to the root of the contract; one that, adopting the wording used in some of the cases, 'evinces an intention not to be bound' by the contract.
13. In Wright v North Ayrshire Council UKEATS/0017/13, the Scottish EAT, chaired by Langstaff J, emphasised that in a constructive dismissal case, the repudiatory breach of contract in question need not be the only or even the main reason for the employee's resignation. It is sufficient that it "*played a part in the dismissal*"; that the resignation was, at least in part, "*in response to the repudiation*"; that "*the repudiatory breach is one of the factors relied upon*" by the employee in resigning. This is the one and only part of the test for whether someone is constructively dismissed in relation to which it is appropriate to look at matters subjectively, from the employee's point of view.
14. The basic facts are these.
15. On 31 August 2016, one of the claimant's colleagues discovered, on a work mobile telephone that AB had been using, a video of AB standing in the respondent's premises in Swadlincote boasting about an assault he had just carried out on someone in the street. I have watched the video, which I shall call the main video, at the claimant's request. It appears to have been taken by a friend of AB's in the middle of the night. It does not make particularly pleasant viewing. The impression given is that AB views beating strangers up as a recreational activity. He is obviously very drunk and/or high. He has an empty bottle of vodka and what looks like a wrap of cocaine with him, which he mimes 'snorting'.
16. AB was not some lad barely out of adolescence but 30 years old. I understand that the plan was for him to take charge of a call centre the respondent had just purchased.
17. The precise chronology is not completely clear, but probably on the same day the claimant and her colleagues looked out a report in the Burton Mail for 27 August 2016 referring to a man having been hospitalised, albeit with relatively minor injuries. At some stage around 31 August or 1 September AB apparently confirmed he was responsible and that this was the assault he was referring to in the main video. I note that according to a news report the following day, the victim remained in hospital, meaning he was hospitalised for at least 24 hours as a result of the assault.
18. Also around 31 August 2016, a further similar video came to light on AB's phone relating to a fight AB was involved in 11 days or so previously. It is a video I have not watched and have not been asked to watch, but it is



described by Mr O'Flynn as being of AB "covered in blood bragging about fighting". Also on the phone were some photographs of AB, which I have seen and which look like 'selfies', showing him with a bloodied face and hands, presumably further proud souvenirs of a good night out.

19. Pausing there, I note that both the videos and the photographs remain in existence and form part of the claimant's disclosure in these proceedings. There is a reference in some of the documents to some other photographs on the phone that I have not seen, but in her witness evidence, the claimant did not identify anything specific of importance that was on AB's work phone and that is no longer in existence. In her witness statement, only the two videos mentioned already are referred to in connection with her resignation. Mr O'Flynn's substantially unchallenged evidence was that the main video remains on the respondent's computer server to this day.
20. The claimant suspended AB and then had a conversation in writing with Mr O'Flynn, who is a US resident and was in Oregon at the time, in the respondent's 'Google Hangout', which is an online private chat room. During the course of that conversation, she sent him the main video. The conversation includes the following:

Mr O'Flynn: Should we sack him, yes/no
Claimant: I don't have any opinion, I leave that up to you
Mr O'Flynn: Well I need your opinion I'll make the choice and it will always be me who makes the decision
Claimant: To be honest, it's so hard as I love Alex to bits
Mr O'Flynn: Sack yes/no
Claimant: I don't know Steve
Mr O'Flynn: OK sounds like a yes though, you just can't misuse our company work space and ruin trust
Claimant: No I'm not saying he seems very sorry and is gutted but I feel on this occasion you need to make a decision
21. Later that day, Mr O'Flynn spoke to AB and confirmed his suspension in writing. AB was apparently remorseful on the phone and he also sent Mr O'Flynn a contrite email, which Mr O'Flynn forwarded to the claimant. AB suggested, amongst other things, that the victim of his assault had attacked AB and therefore that he was not, or would not be, in trouble with the police.
22. By 1 September 2016, Mr O'Flynn had provisionally made a decision about AB's future, which was that AB was to be given a final written warning and to be docked a week's pay. Mr O'Flynn prepared an email to send to AB, which he first sent to the claimant to try to get her views. The first half of the email that Mr O'Flynn had prepared is almost a fatherly lecture on the dangers of drugs and alcohol. That part of the email is commendable. Whether it was appropriate for AB to be given a final chance and not to be dismissed, I shall come on to later in these reasons.



23. The aspect of the letter I personally find unpalatable is the suggestion that, "*If there is police involvement due to your actions, I will terminate your employment with a retroactive date of 31 August 2015*". I find this unpalatable because the implication of it is that what Mr O'Flynn was concerned about was not what AB had done, but only that the police might find out that AB was responsible, causing the respondent reputational damage.
24. I find that unpalatable but the claimant evidently did not. It has never been her case that part of her reasons for resigning was distaste at the suggestion that employment would be terminated only if the police became involved. It has also never been part of her case that the police should have been involved; that the respondent should have reported AB to the police and/or handed over to the police the main video or any other material they had; and/or that the respondent's failure to do so was a cause of her resignation.
25. Even if any of these things are now part of her case, I reject them as wholly unsupported (and, to a large extent, contradicted) by the contemporaneous documentation.
26. When Mr O'Flynn sent the claimant his draft email on 1 September 2016, they had a further online chat about the situation. Mr O'Flynn stated in terms that the outcome set out in the draft email was not final and that he wanted the claimant's feedback. Without needing to go into very much detail, the gist of the claimant's feedback was that it was Mr O'Flynn's decision.
27. It would be fair to say that the claimant comes across [in the online chat on 1 September] as considerably more hesitant about whether AB should continue to work for the respondent than she had done in the chat the previous day. In part of the previous day's chat [*...sounds like a yes though, you just can't misuse our company work space and ruin trust / No I'm not saying...*], she seemed to be stating that she did not want AB sacked. However, crucially to my mind, in the 1 September chat the claimant does not state anything to the effect that she disagrees with the proposal to issue a final written warning instead of dismissal. At one point, she is asked in terms whether she thinks she could still work with AB and she replied that she could.
28. On Friday 2 September, Mr O'Flynn sent an email to staff stating that he had "*remotely wiped all the phone just to tidy things up*". In his oral evidence before us, he unhesitatingly accepted that part of his rationale for doing so was to ensure that the offending videos and photographs were removed from a work phone.
29. The claimant did not return to work. She had a Med3 fit note from 5 September referring to stress related problem due to work. On 8 September, she resigned by email.



30. The relevant parts of that email read as follows:

I am writing further to my conversation with you on Wednesday 31st August 2016 regarding my concerns about [AB] and the videos of him and the one in the Nelson's office.

I am aware that despite the very serious allegations against [AB] and your acknowledgement in your email on the 31st August 2016 that [AB] has been involved in a serious assault and the use of drugs at our office you have decided not to take action against [AB].

I believe that your lack of substantive action has totally undermined the trust and confidence that I have in Nelsons. I am therefore resigning my employment with immediately effect...

31. That email is plainly about, and only about, the decision not to dismiss AB. It states almost in terms that she was resigning because Mr O'Flynn had not sacked AB. In closing submissions, the claimant's solicitor suggested that the claimant could have written a much more detailed letter giving all the reasons, but that she was not a lawyer and is an uncomplicated person. I broadly agree. And because I broadly agree, I think the claimant would have set out in the email no more and no less than what was in her mind when she resigned. If anything else had been a major factor in her resignation, she would have set that out, I think. Certainly, if anything else had been the main reason for her resignation, she would have set that out.
32. I see no good reason not to take the claimant at her word. I am satisfied that the reason she resigned, or at least a significant part of her reasons for resigning, was that by 8 September 2016, at the latest, she had come to the view that she wanted AB dismissed from the respondent's employment. The problem with that as the foundation of a constructive dismissal complaint is that (whatever was going on in her head at the time) the claimant had been given every opportunity by Mr O'Flynn to express that view on 31 August and 1 September and she had not expressed it. Indeed, as already mentioned, at one point on 31 August she seemed to be suggesting her view was that AB should not be sacked.
33. The claimant was the respondent's most senior UK-based member of staff. She was a shareholder of the respondent. The only reason she was no longer a statutory director of the respondent was that she had, a few weeks previously, asked for her directorship to be removed. If such an employee is asked repeatedly what disciplinary action they think should be taken against a member of staff and they choose not to express a view, they cannot very well turn round a week later and complain that what they wanted to happen did not happen. It is hopeless to argue, in those circumstances, that not following a particular course is calculated or likely to destroy or seriously to damage the relationship of trust and confidence.



34. Further, even if the claimant had expressed a clear preference for AB being dismissed and Mr O'Flynn had nevertheless decided to impose a final written warning, that would for me still not be enough to breach the trust and confidence term by itself. I have made plain in these Reasons and during the hearing my distaste for AB's antics and for both parties' failure to involve or provide evidence to the police in relation to them. However, this does not mean that I think the respondent should necessarily have dismissed AB.
35. The right thing to do would perhaps have been to tell AB to hand himself in to the police and to provide the police with the video. Doing that would not have prevented the respondent keeping him on, or would not necessarily have prevented the respondent from keeping him on, if Mr O'Flynn felt, as he clearly did, that AB deserved one last chance. Assuming the claimant had not said anything to the effect that she could not work with AB any longer and/or that she was now frightened of him or something like that, there would be reasonable and proper cause for a decision to impose a final written warning and not to dismiss.
36. As an aside in relation to the law in this area, I am very well aware that in deciding whether conduct was calculated or likely to destroy trust and confidence, I should not be thinking about the so-called 'band of reasonable responses', nor more generally about the reasonableness of the respondent's actions. But the "*reasonable and proper cause*" part of the test for whether something is a breach of the trust and confidence term does require me to think about reasonableness to some extent.
37. The claimant also relies on the email of 2 September about wiping phones as part, or the whole, of the breach of trust and confidence term. In the particular circumstances that exist, I do not think it was. In any event, I am not satisfied that that email, or the wiping of phones, formed any significant part of the claimant's reasons for resigning.
38. The particular circumstances I am referring to include the fact that the claimant must have known (or would have known had she thought about it) that the main video, at least, remained in existence; she had a copy of it herself. If she had any doubts on this score, she could and should have asked Mr O'Flynn for reassurance. She knew it was part of AB's final written warning that his employment would be terminated if the police became involved and she expressed no concern about that aspect of the final written warning. Objectively, then, she was tacitly agreeing to the respondent not involving the police and not providing evidence to the police.
39. The reasons why I am not satisfied that it was any part of the claimant's reasons for resigning that she believed Mr O'Flynn had, as it is put in the claim form, "*deliberately deleted evidence that may have been critical in a serious investigation by the police*" include: first, as above, there is no hint of this in the resignation letter; secondly, also as above, the claimant had



the main video herself so knew it had not been destroyed and if she was so concerned about the police investigation, she would surely have provided it to the police herself at some stage, but to this date has not done so; thirdly, she has changed her story about why she resigned a number of times to such an extent that I am afraid her credibility on this issue is non-existent. I am not saying she has necessarily been lying to me but I am not satisfied that her evidence about this is remotely accurate.

40. The claimant's resignation email I have already mentioned and it gives the reason for resignation very clearly as not sacking AB. However, once she had solicitors on board following threats to sue her for breaking restrictive covenants, she changed her tune completely. I assume, and I think I am entitled to, that when a solicitor writes a formal letter in response to a letter before action, certainly when they prepare claim form particulars of claim, they accurately reflect their client's instructions. What is in her solicitor's letter of 9 May 2016 and what is in her claim form particulars of claim is therefore assumed to be what she was telling her solicitors her reasons for resigning were at the time when those documents were prepared.
41. In the claimant's solicitors' letter of 9 November 2016, there is little or no emphasis placed on the lack of disciplinary action. Instead, what is referred to is this: "*The shocking response was for Mr O'Flynn to remotely delete the videos from his base in America. This is quite clearly an attempt to keep members of staff from reporting criminal behaviour to the police. Given that the police were and still are making public appeals for information about the assault, to delete those videos is astounding.*"
42. The u-turn is even clearer in the particulars of claim. In the particulars of claim at paragraph 23, it is stated that: "*The claimant has not resigned because [AB] was or not was dismissed [which presumably is a typographical error for "was or was not dismissed"]. The claimant has resigned because she no longer has any trust or confidence in her employer. The respondent has deliberately concealed evidence of a serious criminal offence from the police and does not appear to take this seriously. ...*"
43. There was then a further change of case in the claimant's witness statement, in which what was relied on was a combination of lack of action against AB and the remote erasure of the telephones.
44. The claimant's oral evidence on this issue was confused, but her answer to the very last question I asked her was to the effect that the only reason she resigned was because AB had not been sacked.
45. There are many other reasons for doubting the accuracy of much of the claimant's evidence, but what has just been set out is quite sufficient in relation to her evidence as to why she resigned.



- 46. In short, even if there was a breach of the trust and confidence term involved in the deletion of the telephones, I am not satisfied that that was part of her reasons for resigning.
- 47. The respondent's case is that the claimant had a predetermined plan to resign from the respondent and to compete with the respondent. There is a reasonable amount of evidence to support that part of the respondent's case. It is clear to me that the claimant was dissatisfied in her employment even before the events of 31 August 2016. I am not sure why; I do wonder whether there was something else going on which I have heard nothing about. It is also admitted as a fact that very shortly after her resignation, the claimant began to work for a competitor of the respondent called LAP and solicited the respondent's clients for LAP.
- 48. Be that as it may, I do not need to, and do not, making any findings about it. The only issues I need to decide, and the only issues I have decided, are: whether there was a breach of the trust and confidence term – and I have decided there was not; and whether any breach of the trust and confidence term was a reason for resignation – and I have decided it was not.
- 49. For those reasons, the claimant was not constructively dismissed and her unfair dismissal claim therefore fails.

Employment Judge Camp 27.7.17

SENT TO THE PARTIES ON

.15.8.17.....
S.Cresswell

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FOR THE TRIBUNAL OFFICE