



EMPLOYMENT TRIBUNALS

Claimant: Mr D Gunn

Respondent: SaproUK Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 26, 27 and 28 July 2021

Before: Employment Judge Brewer

Representation

Claimant: Mr B Frew, Counsel

Respondent: Ms J Linford, Counsel

JUDGMENT

1. The claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

Introduction

1. This case came before me for a substantive hearing over three days commencing on 26 July 2021. The claimant was represented by Mr Frew of Counsel. The respondent was represented by Ms Linford of Counsel. The claimant gave evidence on his own behalf. He called one witness-Ms Albinia Cunningham; He also provided a witness statement for a third witness-Mr Rhys Coombs. Mr Coombs did not appear to give evidence and so I have given appropriate weight to his witness statement. For the respondent I heard from Mr Peter Moxon, Managing Director and owner of the respondent business and Mr Mark Usher, Chief Operating Officer of the respondent. All of the witnesses took an oath. We had an agreed bundle, and I was also provided with two

further documents during the hearing. The evidence concluded at lunchtime on the second day. I heard submissions in the afternoon, and I delivered judgment on the afternoon of day three. In coming to my decision, I have taken account of the written and oral evidence, the documents and the submissions of both counsel. I have also taken account of Ms Linford's written submissions,

Issues

2. This is a constructive dismissal case. The issues are:
 - a. Did the respondent do the following things:
 - i. Give no regard to the claimant's safety during a global pandemic, and put no measures in place to protect his safety;
 - ii. Take steps to bring someone in above the claimant and not give the claimant the opportunity to apply for that role;
 - iii. Unilaterally change the claimant's duties, for example he was no longer responsible for recruitment;
 - iv. Unilaterally change the claimant's line management;
 - v. Publicly question the claimant's performance on more than one occasion which was degrading and humiliating; and
 - vi. Belittle the claimant in an email from Mr Moxon dated 8 July 2020.
 - b. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - i. 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
 - ii. whether it had reasonable and proper cause for doing so.
 - c. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
 - d. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Law

3. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

"...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

4. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employer 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. That is commonly called constructive dismissal.

5. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

'If 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'

6. In order to successfully claim constructive dismissal, the employee must establish that:
 - a. there was a fundamental breach of contract on the part of the employer;
 - b. the employer's breach caused the employee to resign;
 - c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
7. I note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.
8. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd 1986** ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland 2010** ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.
9. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners 2004** ICR 1, CA.
10. In **Omilaju v Waltham Forest London Borough Council 2005** ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied

term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

11. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

“the crucial question is whether the repudiatory breach played a part in the dismissal”, and even if the employee leaves for ‘a whole host of reasons’, he or she can claim constructive dismissal ‘if the repudiatory breach is one of the factors relied upon”

12. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).
13. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.
14. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

“must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged”

15. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.
16. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a

course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

17. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in **Kaur** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

- a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- b. has he or she affirmed the contract since that act?
- c. if not, was that act (or omission) by itself a repudiatory breach of contract?
- d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
- e. did the employee resign in response (or partly in response) to that breach?

18. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence (see **RDF Media Group plc and anor v Clements** 2008 IRLR 207, QBD). As in that case, this will usually be the employee.

19. In **Hilton v Shiner Ltd — Builders Merchants** 2001 IRLR 727, EAT, Mr Recorder Langstaff QC, as he then was, stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence:

*'When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So, to formulate it, however, omits the vital words with which Lord Steyn in his speech in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** (above) qualified the test. The employer must not act without reasonable and proper cause... To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had*

reasonable and proper cause for the suspension, or for taking the disciplinary action.'

Findings of fact

20. I make the following findings of fact (numbers are references to page numbers in the bundle).
21. The respondent is in the business of selling a range of products – consumables, almost exclusively using the Amazon platform both in the UK and in the USA. At the time of the claimant's resignation, along with himself as the Purchasing Manager, the respondent employed the following people:
 - a. Peter Moxon, Managing Director
 - b. Mark Usher, Chief Operating Officer
 - c. Emma Newborn, Admin Assistant
 - d. Emma Boland, Purchasing Assistant
 - e. Vicky Henson, Accounts
 - f. Michaela Holowczak, Warehouse Operative
 - g. Rhys Coombs, Warehouse Operative
 - h. Lynn Hepple, Warehouse Operative
 - i. John Parker, Warehouse Operative.
22. The claimant was responsible for the key aspect of the respondent's business – purchasing products for onward sales via Amazon.
23. The claimant commenced employment with the respondent on 1 May 2017. There is a dispute as to whether he was originally employed as a sales executive or as an e-commerce executive. Nothing turns on this point but given the nature of the respondent's business I find it more likely than not that he was employed as an e-commerce executive.
24. The claimant was later appointed to the role of Purchasing Manager. There is a dispute as to when that occurred. The claimant now says that was in July 2017. The respondent says it was in April 2019.
25. The claimant and Mr Moxon had a good working relationship.
26. In early 2020 Mr Moxon and the claimant discussed the possibility of a management buy-out. Essentially the proposal was for the claimant to buy the respondent but subject to Mr Moxon providing 60% of the funding and remaining involved with the business after the buy-out, and the claimant providing 40% of the funding. The purpose of Mr Moxon remaining involved in the business was to enable a transition to the claimant over a period while at the same time protecting what would have in effect been Mr Moxon's investment in the claimant's business. That also explains why Mr Moxon was keen to ensure that any funding secured by the claimant to meet his 40% was affordable. In the event the best funding available to the claimant was considered by Mr Moxon to be on terms which made it unattractive and the buy-out never took place.

27. The reason that Mr Moxon was interested in a buy-out was his wish to spend less time being actively involved in managing the business. Given the failure of the buy-out, and having considered his options, Mr Moxon decided to bring in a Chief Operating Officer (COO).
28. In March 2020 the Covid 19 pandemic took hold in the UK and the government introduced various measures to try to deal with the spread of the virus.
29. In April 2020 Mr Moxon offered the role of COO to Mr Mark Usher. Mr Usher accepted the role and he commenced work on 4 May 2020. Mr Usher was known to the claimant.
30. A meeting took place between Mr Moxon and the claimant on 16 April 2020. There are a number of disputes around that meeting and around the introduction of Mr Usher to the respondent's employees in general and the claimant in particular. I shall deal as necessary with these below.
31. Prior to the arrival of Mr Usher the claimant had been involved in recruitment along with Mr Moxon. There are a number of disputes around the precise duties of the claimant before and after the arrival of Mr Usher which I shall deal with below where relevant.
32. On 13 May 2020 Mr Usher emailed the claimant [97/98]. In this email a number of interview dates/interviewees were set out and then Mr Usher said this:
- "If you leave any new applications on Indeed for me to look at and not contact/decline any of them at the moment. Better for you to concentrate on your buying and I will look at them later on today"*
33. On 20 June 2020 Mr Moxon sent an email to Mr Usher, the claimant and Michaela Holowczak headed "USA Problem – Obvious wrong decision made last week!" [101]. The claimant says that this amounted to an open criticism of him and was humiliating.
34. On 8 July there was a series of emails which the claimant says he found distressing, aggressive and undermining and which indicated to him that he was no longer wanted in the business. The exchange was about what information the claimant was to include on a 'task sheet' which was a document summarizing the purchasing activity needed by Mr Moxon so that he knew, at a glance, what the current position was. The exchange may be summarized as follows.
35. At 9:16 the claimant emailed Mr Moxon, copying in Mr Usher [104A]:
- "Morning. What are you wanting on my task sheet...Mark [Usher] this morning has told me, that you have said "a few little numbers isn't good enough"?"*
36. At 9:26 Mr Moxon responded to the claimant and Mr Usher [104A]:

"if you are not in, I want to know the status of each task... Your list doesn't have any explanation. The 2 notes on there I can't understand.

Mark, I've been asking for this for ages. For months! Is this the first time you have mentioned it to Dan?"

37. At 9:27 Mr Moxon emailed the claimant and Mr Usher [104C]:

"If you are not in, I want to know the status of each task"

38. At 9:28 Mr Moxon sent another email to the claimant and Mr Usher [104A]:

"plus...It's not just for me. Mark should want this too so you know where we are with buying"

39. At 9:28 Mr Usher sent an email to the claimant and Mr Moxon [104A]:

"Hello Dan.

It is a case of updating what you do, enter dates to reflect the activity...Yesterday you ran the repricer put a note in the column to show this..."

40. At 9:33 Mr Usher sent an email to Mr Moxon but at the time the claimant resigned he would not have been aware of this email.

41. At 10:04 the claimant emailed Mr Usher and Mr Moxon [104B]:

"So am I putting every last little thing on there?"

Repricer has never been put on before..."

42. At 10:11 the claimant emailed Mr Moxon and Mr Usher [104B]:

[in response to Mr Moxon's comment "The 2 notes on there I can't understand."]

"which notes are these? If I'm not being told then how can I elaborate further?..."

43. At 10:19 Mr Moxon sent another email to the claimant and Mr Usher [104C]:

"Do as I ask. It's not difficult!"

How difficult is it to understand I want sheets filled in so I know where you are at with your workload without having to ask every day.

Mark, you should have sorted this ages ago.

What's that term you used? Kindergarten"

44. At 10:29 the claimant emailed Mr Moxon and Mr Usher [104B]:

"Fully understood"

45. On 9 July the claimant resigned. His resignation letter is at [105] and is as follows:

“Dear Peter,

Thank you for giving me the opportunity over the last 3 years and 2 months. Unfortunately, I am writing this today to inform you that I will be leaving the company on 09/08/2020, giving one months notice.

I wish you and SaproUK all the best for the future. I hope that the work I have performed will help see SaproUK thrive going forwards.

Kind regards”

46. Finally, on 10 July 2020 the claimant says he went to meet Mr Moxon “and explained my reasons for my resignation” (see paragraph 23 of the claimant’s witness statement). The claimant covertly recorded that meeting, and he has provided a transcript which is at [106/107].

Discussion

47. I want to start by dealing with a matter raised by Mr Frew when cross-examining both of the respondent’s witnesses, particularly Mr Moxon. Mr Frew noted that in the response, which Mr Moxon confirmed he had approved, the respondent says in terms that Mr Usher was not the claimant’s line manager and that Mr Usher’s role was not intended to be senior to the claimant’s [32]. However, in his witness statement Mr Moxon says that the intention was for Mr Usher to manage the whole of the business and that the claimant was to report to Mr Usher (paragraph 10 of Mr Moxon’s witness statement). Mr Frew thus challenges Mr Moxon’s credibility.

48. I note that in the claim form, the claimant states that he was promoted to the role of Purchasing Manager in April 2020 [14], which is in fact consistent with what the respondent says. However, in his witness statement he says that he was promoted to the Purchasing Manager role in “around July 2017” (see paragraph 1 of the claimant’s witness statement).

49. In reality, and notwithstanding that the starting point for the case is the pleadings, it is not uncommon for evidence in the employment tribunal to be inconsistent with what is in the original pleadings which are often drafted quickly, before the detailed issues in the case are set out and often long before the shape of the case is clear and before any disclosure has taken place. They are drafted on the basis of the best recollection the parties have at the time. Sometimes those recollections prove to be wrong. I consider that in neither case is the credibility of Mr Moxon or the claimant damaged by this.

50. Given the **Kaur** case, I consider that in determining whether there is a constructive dismissal I should take the following approach:

- a. What acts and omissions does the claimant say together amounted to a breach of trust and confidence?

- b. Was there a course of conduct comprising some or all of the above acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
- c. Did any single act or omission amount to a repudiatory breach of trust and confidence?
- d. If there was a course of conduct, what was the most recent act (or omission) on the part of the respondent which the claimant says caused, or triggered, his resignation?
- e. Had the claimant affirmed the contract since the act at (c) or (d) above?
- f. If not, did the claimant resign in response (or partly in response) to that breach?

51. I remind myself that the test is objective. The matters that the claimant relies upon as cumulatively amounting to a breach of trust and confidence (the straws) are those set out at paragraph 16 of the grounds of claim [16] and which I have summarized at paragraph 2 above. I shall deal with each in turn.

The respondent gave no regard to the claimant's safety during a global pandemic, and put no measures in place to protect the claimant's safety

52. In the oral evidence very little was made of this allegation. The claimant says little about this. At paragraph 4 of his statement, he says that he believed he could work from home. At paragraph 5 he says that he contacted Mr Moxon who advised him that he should attend work and at paragraph 6 he says that:

"I was concerned that the respondent had not done anything to safeguard staff throughout the global pandemic and that the measures taken to protect staff were minimal".

53. There is of course an inherent contradiction between stating that the respondent had not done anything to safeguard staff and that the respondent took measures to protect staff albeit they were considered by the claimant to be minimal. Either measures were taken, or they were not.

54. The evidence from the respondent amounts to this. They had only 8 staff. Desks were already more than 2 meters apart, social distancing was thus in place, sanitizer was provided to everyone both for personal use and for use on surfaces. There is no suggestion that any staff member contracted covid 19 from the respondent's workplace and the claimant continued working without it seems raising the matter again.

55. On any objective measure this was not a breach of trust and confidence. If anything, the claimant's continued working and the fact that he did not raise the matter again after March 2020 strongly suggests that he retained confidence in the respondent's covid 19 measures.

56. Thus, at the date the claimant decided to resign, 9 July 2020, he was aware of the measures taken, and because he says they were minimal he could not reasonably have concluded that the respondent had taken no measures nor that they needed to do more given that there is no evidence that the measures that were in place were anything but successful.

57. I do not consider that in taking such measures as it did and not taking other measures the respondent was in breach of the implied term of trust and confidence.

The respondent took steps to bring someone in above the claimant and not give the claimant the opportunity to apply for that role

58. There are two ways to read this complaint. First it is one complaint that, in effect Mr Moxon created a more senior role which the claimant could not apply for. Second it can be read as encompassing two straws. First is the fact of the appointment, second is the lack of opportunity.

59. Dealing first with the appointment, this is obviously a reference to the appointment of Mr Usher. In a very literal sense, given that the claimant would appear to have been the second most senior member of staff other than Mr Moxon prior to Mr Usher's arrival, when Mr Usher was appointed as the COO he was "above" the claimant. It is however difficult to understand the basis of the claimant's criticism. He knew from his discussions with Mr Moxon over the possible buy-out, that Mr Moxon wanted a less hands on role in the business. There is no suggestion this changed simply because of the claimant's failure to get finance for his portion of the buy-out. While perhaps not inevitable, it seems to me to be hardly surprising that the alternative for Mr Moxon was to formally appoint a 'second in command', in this case a COO to take on those tasks that Mr Moxon wished to step back from. I accept Mr Moxon's evidence on this point.

60. There is no express or implied term of the claimant's contract which limits the respondent from appointing new members of staff save of course if that appointment is a breach of trust and confidence and I do not understand the claimant to be arguing that in and of itself it was such a breach. He complains, as one straw, that Mr Usher was to be "above" him.

61. Dealing with the lack of opportunity to apply for the role, again the claimant had no express or implied right to be given or to apply for any particular role in the business. I note that in this case in and around early to mid 2020 Mr Moxon had some doubts about the claimant's ability to run the entire business. As he said in cross-examination: "it was not my view that the claimant could run the entire business" This is supported by the evidence about the proposed structure of the buy-out. It was the unchallenged evidence of Mr Moxon that he would remain in the business for some time to assist the claimant who was not ready to take over running the whole business.

62. That being the case I find that the purpose of the COO role was to take over the day to day operational duties which Mr Moxon was undertaking thus enabling Mr Moxon to take a step back from the everyday running of the business.

Considering the evidence, I find that first there was no right for the claimant to apply for the COO role and second even if he had applied, he would not have been appointed.

63. I do not find that the respondent was in fundamental breach of the claimant's contract of employment either in appointing Mr Usher or in not considering the claimant for the COO position.

Unilaterally change the claimant's duties, for example he was no longer responsible for recruitment

64. Under this straw only two matters of substance were discussed in the evidence. The first related to recruitment, the second concerned the issue of the traffic light proposal.

65. Before turning to those specific matters, it is necessary to consider what the claimant's duties were. Although not expressly stated in the 'straw' it seems to me that the claimant's case is that it was the arrival of Mr Usher which precipitated the alleged change in duties. We know that Mr Usher started on 4 May 2020. The claimant agreed that as from 1 April 2020 the claimant's relationship with the respondent was governed by the contract of employment which starts at [44] (the Agreement).

66. Clause 35 of the Agreement states that:

"this Agreement will supersede any and all pre-existing employment agreements...Any duties, obligations and liabilities still in effect from any pre-existing employment agreement are void and no longer enforceable after execution of this agreement.

This Agreement constitutes the entire agreement between the parties and there are no further terms or provisions either oral or written..."

67. As I have said, save for any of the usual implied terms this drafting is definitive. From 1 April 2020 this Agreement governed the relationship between the respondent and the claimant.

68. Schedule 1 of the Agreement sets out the claimant's job description and his duties. There is no reference to recruitment in Schedule 1. There is no evidence that any of the duties in Schedule 1 were subsequently changed although I can see an argument that Mr Usher's involvement in the 'traffic light' issue impinged upon the claimant's responsibility for designing and implementing "plans and procedures to meet" the responsibilities of his role (see 10(b)(i) at [57]).

69. Before I look at that, it is just perhaps worth recording, if only for the avoidance of doubt, that in relation to recruitment I find that at no point was the claimant "responsible for recruitment" as the ET1 suggests he was, and to be fair to the claimant, in his evidence he did not really pursue the point and conceded in cross-examination that point 16(c) at [16] "is not accurate...I agree I was never responsible for recruitment". His evidence was that he undertook a sift of applications, he did the first interview with Mr Moxon and if there was a second

interview that would be done by Mr Moxon. He said that Mr Moxon set the terms and formally made the appointment. Once Mr Usher was employed the only evidence around recruitment was one email sent by Mr Usher to the claimant on 13 May 2020 [97/98]. As I set out above, in this email a number of interview dates/interviewees were set out and then Mr Usher said this:

“If you leave any new applications on Indeed for me to look at and not contact/decline any of them at the moment. Better for you to concentrate on your buying and I will look at them later on today”

70. It was intended that the claimant interview the applicants along with Mr Usher and as the claimant confirmed, he appointed staff recruited to the purchasing team. It seems therefore that on this one occasion (because there is nothing to suggest that this was anything other than related to the then ongoing recruitment round) all Mr Usher was saying to the claimant was that if there were further applications he would sift them so that the claimant could concentrate on purchasing. This does not amount to the claimant no longer being responsible for recruitment.
71. Turning then to the traffic light issue, it seems that Mr Moxon tasked Mr Usher with improving the processing of goods into the warehouse. Given that the processing of goods followed the purchasing of goods there is arguably a connection between the purchasing function and the processing of the purchased goods. Mr Usher along with Ms Henson and Ms Newborn came up with a traffic light system which they presented to staff including the claimant. The did not think the system would work. He says he gave examples of the problems.
72. Considering Mr Usher’s contract of employment specifically at [74] this seems to have been well within the scope of his duties it being a warehousing issue. In any event the claimant was given an opportunity to comment and his concerns appear to have been listened to.
73. In all the circumstances there is no evidence of a change to the duties the claimant had agreed to in the Agreement generally and as he was never actually responsible for recruitment and given that he retained the same or very similar involvement in recruitment after Mr Usher arrived there was no breach of the implied term of trust and confidence.

Unilaterally changing the claimant’s line management

74. There was a good deal of evidence about what the claimant says he knew or did not know about Mr Usher’s appointment.
75. Given how he puts his case however, what is clear is that at the point he decided to resign he was aware that Mr Usher was his line manager, which is consistent with the respondent’s evidence.
76. In the Grounds of Complaint, the claimant states that:

“On 4 May 2020 Mr Usher was appointed as Chief Operating Officer for the Respondent. The claimant was made aware of Mr Usher’s appointment by Mr Moxon on 15 April 2020...”

77. In his witness statement at paragraph 9 the claimant states that:

“Peter approached me on the 15 April 2002 to advise me that he had decided to recruit a COO to the business and Mr Mark Usher would be joining on the 4 May 2020”

78. In his oral evidence, under cross-examination, the claimant said that paragraph 9 of his statement was incorrect and that he did not know that a COO was being recruited. His oral evidence was therefore that he was told by Mr Moxon, following the abandoned buy-out option, that Mr Moxon would proceed with his plan to expand the business, he was told that Mr Usher would be joining the business, but he was not told that Mr Usher was to be the COO and he was not told that he would be reporting to Mr Usher.

79. Mr Moxon’s evidence was that he introduced Mr Usher to all of the staff, including the claimant, in early May 2020. Staff were told that Mr Usher was the COO, staff were to report to Mr Usher save for the claimant’s purchasing team who would continue to report to the claimant for matters relating to purchasing.

80. The claimant does not dispute that Mr Usher was appointed as the COO. He does not dispute that he knew that Mr Moxon wanted less involvement in day to day operations (he was aware of this from his discussions around the proposed buy-out). There is no evidence that staff were confused or unclear as to Mr Usher’s role. I find it inconceivable that Mr Moxon, an experienced businessman, who had taken the trouble to appoint Mr Usher as his second in command and to introduce him to all of the staff, would not have been very clear as to his role and responsibilities. Further, I find it inconceivable that had that been the case, staff, including the claimant, would not have asked what Mr Usher’s role was and in short ask, “how does that affect me?”. In fact, both the ET1 and the claimant’s witness statement are consistent with that – the claimant says he asked whether he would have to report to Mr Usher and was told he would not have to. I do not find the claimant’s oral evidence on this at all credible and prefer the evidence of Mr Moxon.

81. Of course, it is a moot point whether anything turns on this because the claimant says at paragraph 10 of his statement that after Mr Usher’s appointment:

“what became apparent very quickly was that I was expected to report to him.”

82. The respondent does not deny that the position changed from the claimant reporting to Mr Moxon to him reporting to Mr Usher. Thus, the claimant’s line management was unilaterally changed.

83. The claimant’s line management is not set out in his contract, in the Agreement. He is required to update Mr Moxon on operational matters of importance and as

we shall see in the discussion below, that requirement did not change. Ms Linford, in dealing with this point, referred the claimant to clause 2 of the Agreement, the requirement that he may be required to carry out “other reasonable duties”, but in my view this is limited by use of the term “from time to time” which suggests temporary changes to duties, not the apparent permanent change of, for example, line manager. I do accept that there is an implied term that the employee will obey lawful and reasonable instructions and also an implied term of co-operation and it seems to me that given Mr Moxon was stepping back from operational duties and given that to a large extent Mr Usher was taking over those duties it was lawful and reasonable to require the claimant to report to Mr Usher and to expect the claimant to co-operate in doing so.

84. Perhaps equally importantly I remind myself that where a ‘trust and confidence’ case is being pursued, a key question is whether what the employer did it did without reasonable and proper cause. If it had reasonable and proper cause then it could not have acted in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.
85. In this case it seems self-evident that, given all the circumstances, in particular Mr Moxon stepping back from day to day operational control of the respondent, what else was Mr Moxon to do other than have staff, including the claimant, report to Mr Usher rather than to him, because *absent* that, the claimant would have had no-one to report to.
86. In the circumstances I find that the change in reporting did not amount to a breach of the implied term of trust and confidence.

Publicly question the claimant’s performance on more than one occasion which was degrading and humiliating

87. Under this heading the claimant refers to:

- a. An email from Mr Moxon on 20 June 2020 at 15:22 [101];
- b. An email from Mr Moxon on 20 June 2020 at 4:43 [99/100];
- c. An email from Mr Moxon on 8 July 2020 at 10:19 [104C].

88. Turning first to the email on 20 June 2020 at 15:22. This is an email to Mr Usher, the claimant and Ms Holowczak. It is headed “USA Problem – Obvious wrong decision made last week” and states:

“The picture on the Amazon listing is incorrect...@Dan You need to get this listing fixed before we can sell the products...”

89. It goes on to deal with not sending out the product until the problem is fixed and not letting this happen again. It also says that the problem should have been picked up sooner.
90. The claimant says that this email was an open criticism of his performance which he found humiliating. He complains that it was sent to “so many people” (see paragraph 15 of his witness statement) and he says after he responded to

this email,. He got another email from Mr Moxon, copied to the same people which was aggressive and humiliating.

91. Mr Moxon explained in his evidence that if a customer orders a product and what arrives does not match the description, in this case a picture, this would result in goods being returned and unhappy customers. The respondent would also be marked down by Amazon who note such issues.
92. Mr Moxon also says that in fact it was Mr Usher who was ultimately responsible for this as it was a warehouse or operations issue not a purchasing issue. To that end the email was sent to Mr Usher, as first named, second to the claimant and finally to Ms Holowczak as the warehouse operative. It was sent to the claimant as he was being asked to fix the problem.
93. Significantly, the claimant's evidence about this was that he was aware of the issue and had fixed it by the time of the email and had told both Mr Usher and Ms Holowczak that it was ok. In that context it is extremely difficult to see why what the claimant says was an incorrect email from Mr Moxon was either a criticism of the claimant or humiliating. The people sent the email we all already aware that a) there had been an issue and b) the claimant had fixed the problem. The claimant's reaction is out of all proportion to the email which at worst does not apportion blame and asks the claimant to fix a problem which he had done already.
94. The claimant emailed a response to Mr Moxon which explained:

"I gave Michaela the go ahead after explaining..."
95. Michaela is a reference to Ms Holowczak. That being the case, if as the claimant's email says it was Ms Holowczak who sent out the product, and the criticism in Mr Moxon's email is about that, then logically the criticism is not directed at the claimant; it is either criticism of Ms Holowczak or, more likely, because Mr Moxon did not know who was responsible, criticism of everyone in the email.
96. As to Mr Moxon's second email, it is again hard to see why the claimant says that was either aggressive or humiliating. On any reading of the email Mr Moxon is thanking the claimant for clarifying the position, stating that he must have missed something and then in effect asking the claimant to take him through what happened "on Monday".
97. Nothing in this exchange comes close to a breach of trust and confidence. It was not reasonable for the claimant to read the emails as public criticism of him. If anything, it is private criticism of three staff members. Given that both Mr Usher and Ms Holowczak were already aware that the claimant had dealt with the issue it is more likely that Mr Moxon would look foolish for raising an issue that had already been resolved, although not if he could not have known that the resolution had already occurred.
98. I find that given the nature of the issue Mr Moxon had reasonable and proper cause to send both the emails.

Belittling the claimant in an email from Mr Moxon dated 8 July 2020

99. To reiterate this issue, on 8 July there was a series of emails which the claimant says he found distressing, aggressive and undermining. The exchange was about what information the claimant was to include on a 'task sheet' which was a document summarizing the purchasing activity needed by Mr Moxon so that he knew, at a glance, what the current position was. The exchange was as follows.

100. At 9:16 the claimant emailed Mr Moxon, copying in Mr Usher [104A]:

"Morning. What are you wanting on my task sheet...Mark [Usher] this morning has told me, that you have said "a few little numbers isn't good enough?"

101. At 9:26 Mr Moxon responded to the claimant and Mr Usher [104A]:

"if you are not in, I want to know the status of each task... Your list doesn't have any explanation. The 2 notes on there I can't understand.

Mark, I've been asking for this for ages. For months! Is this the first time you have mentioned it to Dan?"

102. At 9:27 Mr Moxon emailed the claimant and Mr Usher [104C]:

"If you are not in, I want to know the status of each task"

103. At 9:28 Mr Moxon sent another email to the claimant and Mr Usher [104A]

"plus...It's not just for me. Mark should want this too so you know where we are with buying"

104. At 9:28 Mr Usher sent an email to the claimant and Mr Moxon [104A]:

"Hello Dan.

It is a case of updating what you do, enter dates to reflect the activity...Yesterday you ran the repricer put a note in the column to show this..."

105. At 9:33 Mr Usher sent an email to Mr Moxon but at the time the claimant resigned he would not have been aware of this email.

106. At 10:04 the claimant emailed Mr Usher and Mr Moxon [104B]:

"So am I putting every last little thing on there?"

Repricer has never been put on before..."

107. At 10:11 the claimant emailed Mr Moxon and Mr Usher [104B]:

[in response to Mr Moxon's comment "*The 2 notes on there I can't understand.*"]

"which notes are these? If I'm not being told then how can I elaborate further?..."

108. At 10:19 Mr Moxon sent another email to the claimant and Mr Usher [104C]:

"Do as I ask. It's not difficult!

How difficult is it to understand I want sheets filled in so I know where you are at with your workload without having to ask every day.

Mark, you should have sorted this ages ago.

What's that term you used? Kindergarten"

109. At 10:29 the claimant emailed Mr Moxon and Mr Usher [104B]:

"Fully understood"

110. It was, according to the claimant, the 10:19 email which was the last straw. It was put by Mr Frew to Mr Moxon that the claimant had never been spoken to like this before.

111. To put this into context it is important to see the sequence I have set out above. The email chain is started by the claimant asking what Mr Moxon wanted him to include in his task sheet. [104A]. Mr Moxon replies at 9:26. This email tells the claimant exactly what is needed. It also contains an apparent criticism of Mr Usher for not dealing with this sooner. Mr Usher's email at 9:28 is also clear on what is needed. It is a clear and measured email.

112. The claimant's response to Mr Usher and Mr Moxon at 10:04, more than 30 minutes later, so he clearly had time to consider it, starts with:

"So am I putting every last little thing on there?"

113. It seems to me that the drafting here indicates that the claimant was less than happy. His use of "*every last little thing*" exhibits at best annoyance on the part of the claimant. It is perhaps not surprising that Mr Moxon responds somewhat directly with what I might term a 'just do it' response. Insofar as Mr Frew argues that Mr Moxon has never spoken to the claimant like this before, there is likewise no evidence that the claimant had spoken to Mr Moxon as he did either. But in the end what does this amount to? It is a few minutes out of one day out of a long working relationship. I do not agree with Mr Frew that this somehow marked a sea change in the relationship between the claimant and Mr Moxon. It is simply an example of two people having a small disagreement and the claimant reaction was not reasonable. He was being given a very clear and reasonable instruction on what to include in his task sheet and instead of getting on with it he challenged the need for "*every last little thing*".

114. Mr Moxon had reasonable and proper cause to require the completion of the task sheet as he wanted them. His last email was not a breach of trust and confidence, it was tetchy response to a tetchy email from the claimant.
115. I have set out my analysis of each of the matters the claimant complains of. None of them alone amount to a breach of trust and confidence. That leaves the question of whether there was there a course of conduct comprising some or all of the acts and omissions complained viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
116. In short, there was not. Looking at the issues in the round either they did not occur at all (the pandemic issue, the change in duties issue and the publicly question the claimant's performance), or the respondent acted with reasonable and proper cause (appointing the COO, not considering the claimant for the role and unilaterally changing the claimant's line management.
117. What is left is the final concern which the claimant puts as belittling him in the email from Mr Moxon dated 8 July 2020. Nothing in the email from Mr Moxon was belittling. As I have set out above Mr Moxon's email at 10:19 as tetchy as the claimant's is at 10:04. The very worst Mr Moxon could be accused of is a moment's anger, but that is a long way short of conduct which is calculated or likely to destroy or seriously damage trust and confidence
118. In short, the respondent did not either through any single act or omission complained of, or by a combination of any of them, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant and the claim of constructive dismissal fails.

Employment Judge

Date: 28 July 2021

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