



EMPLOYMENT TRIBUNALS

Claimant

Mr M Clifton

Respondent

v Maximus UK Services Limited

Heard at: Leeds by CVP

On: 19-20-21 March 2024

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person

For the Respondent: Mr D Mold of Counsel

JUDGMENT

The claim for unfair dismissal fails.

REASONS

Claims

1. The claimant brings a claim of unfair constructive dismissal.

Evidence

2. There was an agreed bundle of documents paginated and indexed of 468 pages.
3. I heard from the claimant and the following respondent witnesses namely Mr M Britton, Investigating officer, Mrs L Rhodes grievance hearing officer. Ms C Hale Disciplinary Officer.
4. Each made an affirmation and gave evidence having produced a written statement which was taken as read and each was cross examined.
5. Notwithstanding the fact that this is a claim for constructive dismissal and the burden of proof falls to the claimant to show dismissal the parties agreed that the respondent witnesses should go first.

Law

6. Section 94, Section 95(1)(c) Employment Rights Act 1996.
7. **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
 - Was there a breach of the contract of employment?
 - Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
 - Did the employee resign in response and without affirming the contract?
8. It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: **Malik v BCCI [1997] IRLR 462**. This is a demanding test. The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee.
9. Individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal.
10. The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee.
Once a repudiation of the contract by the employer has been established, the Tribunal must ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end.
11. The employee's resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see **Nottinghamshire County Council v Meikle [2005] ICR 1, CA**;
12. **Blackburn v Aldi Stores Ltd 2013 ICR D37, EAT**, the Appeal Tribunal confirmed that a failure to adhere to a proper procedure when handling a grievance is capable of amounting, or contributing, to a breach of the implied term of trust and confidence. It is for the employment tribunal to assess in each particular case whether what occurred was sufficiently serious as to amount to a breach of the implied term, since a failure to comply with a grievance procedure may take different forms and thus have different consequences.
13. **Burn v Alder Hey Children's NHS Foundation Trust (respondent) [2022] IRLR 306**

Lord Justice Underhill: There may not on the orthodox view be a general implied duty on an employer to act fairly in all contexts; but such a term is very readily implied in the context of disciplinary processes. The requirement in para

1.16 that the practitioner be given the opportunity to put their version of events, necessarily implied that they had to be shown any documents that they fairly needed in order to be able to do so; what those documents were would obviously depend on the particular circumstances of the case.

Issues

14. Unfair dismissal

14.1 Was the claimant dismissed?

Did the respondent do the following things:

- i. Fail to investigate the complaints against the claimant in good time. The complaints were first made in July 2022 but were not put to him until July 2023.
- ii. The investigating officer Mr Britton in July 2023 called the claimant directly to a disciplinary meeting notwithstanding that no investigatory meeting had taken place Mr Britton agreed that this was an error and in breach of the company disciplinary policy.
- iii. Send the email instructing the claimant to attend the disciplinary meeting on the 4th of August 2023 but failed to detail the misconduct alleged merely stating that the charges were that of bullying and harassment of M G and A S without detailing what constituted said bullying and harassment ie what happened when and where.
- iv. Fail to provide notes of the investigatory meetings to the claimant within the specified time frame to enable him to consider and sign off in breach of the company policy
- v. The investigatory officer Mr Britton had a closed mind having made a promise to M G – “ *In the past it probably has not been dealt with properly Reassurance that something will be done*” - Meeting Britton and M G 31st of July 20 23 before the investigation of the claimant had been completed
- vi. The respondent pressed ahead with the disciplinary proceedings before Mr Clifton’s own grievance had been completed ie before his appeal deadline

14.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

- 14.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
- 14.2.2 whether it had reasonable and proper cause for doing so.

14.3 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.

14.4 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.

Findings

15. Having considered all of the evidence both oral and documentary I make the following findings of facts on the balance of probabilities which are relevant to the issues to be determined. When I heard or read evidence about which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

16. The claimant was employed by the respondent as a business manager from the 20th of September 2021 (as set out in his contract of employment) until the 20th of October 2023 when he resigned. The claimant claims unfair constructive dismissal. ET1 was submitted on the 20th of October 2023 following Acas early conciliation which began on the 20th of October 2023 and ended on the same day.

17. The respondent business is contracted under the DWP Restart programme, designed to find employment for clients returning to the job market. The claimant was a business manager and, in that capacity, led a team of between six and 10 people dealing with clients and subject to targets.

18. The claimant was employed under a contract of employment dated 8th of September 2021 which refers to company disciplinary and grievance policies but expressly provides that these policies do not form part of the contract of employment. Nevertheless, an employee has the right to expect that such policies and the Acas code will be followed.

19. In or about September 2022 the respondent received a grievance from a member of Staff in the claimant's team namely MG complaining of lack of support and discriminatory treatment because of disability.

I am told that MG has mental health issues as an underlying disability and Multiple Sclerosis. The claimant has not disputed the claim of disability on the part of MG.

This complaint appears not to have been taken up by the Respondent until April 2023 when Shubad Ujam (SU) began their investigation. SU did not interview the claimant as part of the investigation and it would appear that the claimant

was not informed of the grievance nor notified of the complaints against him until August 2023 when he was interviewed by Mr Britton.

20. SU appears to have concluded their investigation on the 3rd of July 2023 and the recommendation was that formal action by way of disciplinary proceedings was required and a further investigation into the concerns raised by the witnesses that had been interviewed in addition to MG.
21. The next investigation was put in the hands of Mr Matt Britton on the 10th of July 2023. There were now three charges being levelled against the claimant
 - bullying and harassment towards MG
 - bullying and harassment towards AS
 - failure to submit variation of contract form
22. By letter date of the 17th of July 2023 from Mr Britton the claimant was invited to a disciplinary meeting with regard to the above allegations. The letter does not set out in any detail the charges in any detail. However, it is said to include investigation notes and the written grievance from AS. The claimant asserts that he has never seen the grievance submitted by AS or the grievance submitted by MG. These grievances are not in the bundle and I prefer the evidence of the claimant that notwithstanding the letter he has never been provided with a copy of either grievance.
23. AS is said to have a disability and suffers from Fibromyalgia, the claimant has not disputed this.
24. This letter of the 17th of July 2023, which stated that the matter was going straight to a disciplinary hearing notwithstanding the fact that the claimant had never been interviewed about the complaints against him, alarmed the Claimant who immediately responded to Mr Britton to complain that such an approach was in breach of the Disciplinary procedure and that this was a very serious matter with his employment being at stake. The company's disciplinary policy clearly sets out an expectation that an employee should not be subjected to disciplinary proceedings without an investigatory stage.
25. Mr Britton conceded the point and reissued the letter on the 20th of July 2023 making it clear that the meeting scheduled for the 4th of August 2023 would be an investigatory meeting not a disciplinary meeting. Mr Britton apologised to the claimant and claimed that the letter had been sent in error. The claimant accepted the apology both by email and in the meeting that followed. It is clear from the meeting notes that the purpose of the meeting and the manner in which it was conducted and the outcome all show that this was an investigatory meeting and the mistakes in the original letter had been corrected.
26. Mr Britton conducted his investigatory meeting with the claimant on the 4th of August 2023 and the notes of that meeting were taken by Sarah Ayodele. Mr Britton went through the complaints made by MG and AS and others with the claimant and gave the claimant the opportunity of addressing the allegations made against him. The allegations all appear to relate to matters arising in

2022. The period relating to AS was to October 2022. No dates are clear relating to the complaints by MG but the latest date appears to be August 2022.

27. The notes of the investigation meeting show that Mr Britton did not put to the claimant precisely what allegations were being made against him IE precisely what he was alleged to have said and done to whom when and where. The points that Mr Britton put to the claimant were made in general terms and the complaints recorded in the statements of MG, AS and the other members of staff interviewed had been given to Mr Britton for the most part only in general terms although specific examples of name calling were given. Nevertheless, despite this lack of specificity and despite the very long delay between September 2022 when the MG grievance was first lodged and the interview with the claimant in August 2023, the claimant had no difficulty in recalling matters and addressing the allegations put to him. Counsel for the respondent very thoroughly took the claimant through the note of the investigation and the claimant accepted during the investigation and during the tribunal hearing that he was able to deal with the matters put to him. He did not advance by way of complaint any particular matter which he was unable to deal with because of the lapse of time.
28. The notes of the investigation meeting with Mr Britton were enclosed undercover of an email dated the 10th of August 2023 which included copies of the Investigation summary and notes of witness statements. The claimant was unable to open these documents because they were password protected and he was not given the password and it seems that Mr Britton did not have the password. The claimants waited 15 days before telling Mr Britton that he was unable to open the enclosures. Mr Britton tried to help and sought advice from HR and eventually the note taker sent Mr Clifton a PDF copy about 10 days later. The claimant complains that he did not receive the notes for consideration and correction until 5 weeks had elapsed and this constituted a breach.
29. On receipt of the notes there was still time to correct them before the disciplinary hearing took place on 17th of October 2023. In his disciplinary hearing the claimant took no steps to highlight anything in the notes that required correction. In his evidence before the tribunal he made no complaints that Mr Britton's notes were wrong in any material respect. The disciplinary policy provides that the investigation report and the evidence relied on shall be given to the employee before the disciplinary hearing. However, there is no specific time limit by which it shall be done. The respondents accept that 5 weeks to provide this material was rather too long but the delay was caused in part by the claimant himself and there is no evidence at all that it was done in bad faith to disadvantage him at the disciplinary hearing.
30. On the 5th of September 2023 the claimant raised his own grievance complaining about the procedural arrangements and the conduct of the investigation so far. Ms L Rhodes was charged with dealing with the matter and a grievance meeting was held on the 18th of September 2023. Ms Rhodes produced an investigation report on the claimant's grievance on the 10th of

October 2023 a copy of which was sent to the claimant by email on the 11th of October 2023.

31. In his grievance the claimant complained about

- Summoned to a disciplinary hearing notwithstanding the investigatory stage had not taken place
- The failure to enclose key documents with the letter – There were no attachments
- Delay in dealing with the grievances of MG and AS requiring the claimant to answer charges relating to matters which took place over 12 months earlier
- Failure to look into the sickness record of AS
- The decision was made to refer the matter to a disciplinary hearing before the claimant had the opportunity to consider and sign off the notes of the meeting
- Delay in providing the notes which were password protected
- Mr Britton did not know the Respondents disciplinary grievance policies

32. Ms Rhodes concluded in terms that she was satisfied that although this was regrettable the invitation to the disciplinary hearing was a genuine mistake and that Mr Britton had apologised for it. She found that Mr Britton had otherwise acted within the terms of the policy. Even if there was a delay in putting the allegations to the claimant, he was not disadvantaged by it and was able to deal with the points put to him. Although the delay in supplying the notes of Mr Britton's meeting was unfortunate and the claimant should have had access to the notes sooner given the chronology it would have made no difference as he still had time to consider and correct the notes before the disciplinary hearing. She concluded that there had been no breach of the policies. Her recommendations included that meeting notes should be provided in good time and not password protected and that all managers should be made familiar with the Discipline and grievance policies but no other action was required. The deadline for appealing the grievance decision was the 18th of October 2023. The claimant did not appeal the decision.

33. On the 11th of October Ms Hale wrote to the complainant inviting him to a disciplinary meeting on the 17th of October 2023. The claimant sought to have the disciplinary meeting deferred until after his grievance appeal. Ms Hale declined his request and the meeting went ahead as planned on the 17th of October 2023. There was nothing to stop him from raising his complaints about the procedures and conduct of the investigation to date at the disciplinary hearing. He did not do so and did not appeal.

34. Before the disciplinary hearing the claimant had asked for permission from the HR Department to secure his own witnesses and this was given. He produced documents from at least 5 members of staff whose comments are recorded in the draft disciplinary outcome letter and were broadly favourable of the claimant. Ms Hale considered these documents but gave little weight to them

because in her view they had been garnered by the claimant for the purposes of the disciplinary hearing and she could not be sure that they were obtained neutrally. In her view a better course and more appropriate course to take would have been for the claimant to have given her the names and contact details of his witnesses and for her to have spoken to them. Although her view is in line with the disciplinary policy it is a matter of regret that this was not communicated clearly to the claimant. This could not have contributed to his decision to resign as he would not have been made aware of Ms Hales approached to his witnesses until afterwards.

35. On the 19th of October 2023 the claimant provided comments on the Disciplinary meeting notes.
36. On the 20th of October 2023 a meeting was convened in order to give the claimant a letter from Ms Hale setting out her decision which I accept would have been summary dismissal. The claimant resigned with immediate effect before that letter could be given. The respondent accepted his resignation.
37. By the disciplinary hearing the claimant had been provided with all relevant documentation and notes save for the original grievance forms from MG and AS which are not in the bundle.
38. When later on after the resignation, the claimant obtained documents through a subject access request, it transpired that the letter of 17 July 2023 had been sent on the instructions of the HR Department and that Mr Britton had been acting on their instructions to bypass the investigatory stage. When the claimant discovered that direction of the HR Department, he believed that this was a determined strategy on the part of the company to be rid of him and not a mistake. However, his knowledge of the HR directive did not impact on his decision to resign because he only discovered this after he had done so.
39. Initially the claimant had been prepared to accept that Mr Britton's apology and correction. He had doubts when just before the disciplinary hearing he discovered in the notes of Mr Britton's meeting with MG the following comment -

" Investigation has been taken seriously and actions and recommendations will be made in the past it probably has not been dealt with properly Reassurance that something will be done". The claimant assumes this to be a promise by Mr Britton to MG to dismiss the Claimant. Mr Britton explained to the tribunal and I accept his explanation that he had made no such promise to MG but intended to reassure MG that his complaint, having drifted from September 2022 would be investigated and dealt with appropriately but not that the claimant would be dismissed. Despite his concerns the claimant continued in the disciplinary procedure and did not resign in response at that stage.
40. I also accept Mr Britton's evidence that he regarded the direction to bypass the investigatory stage to be an error. He assumed it as his own error being the author of the letter, he agreed with the claimant that an investigatory stage was in fact required and set about correcting the mistake, he regretted following H R's initial instructions rather than exercising due diligence and checking the disciplinary procedure for himself.

Conclusions

1. The conduct of the grievance against the claimant, the investigation into his conduct and his own grievance was not without fault.

2. There was a failure to investigate the complaints made by MG in good time.

I am told that MG's complaint was made in September 2022. The grievance complaint form submitted by MG at that time (If there was such a form) has not been given to the claimant and is not in the tribunal bundle. It was not until August 2023 that any allegations were put to the claimant.

This degree of delay primarily disadvantages a 'victim' who can expect to have his grievances dealt with promptly under the company procedure. However, it also puts the 'accused' at a disadvantage because there is a very great risk that if allegations are put to the accused so long after the event that his capacity to recall events and defend himself has been adversely affected by the passage of time.

However, this is not the situation in this case and the claimant has acknowledged that in the investigation hearing with Mr Britton he was able to deal with the allegations put to him and appears not to have been disadvantaged at all.

3. The investigating officer Mr Britton in July 2023 called the claimant directly to a disciplinary meeting notwithstanding that no investigatory meeting had taken place Mr Britton agreed that this was an error and in breach of the company disciplinary policy. Mr Britton apologised both in writing and at the meeting and the claimant accepted that apology. Insofar as this was a breach of the disciplinary and grievance procedure it was corrected by Mr Britton who issued a new letter confirming that this the meeting would be an investigatory meeting and the notes of that meeting confirm that it was conducted by Mr Britton as such.

When the claimant raised his objections to such a procedure, Mr Britton reviewed the position and corrected it as above.

By the time the meeting took place on the 4th of August 2023 the claimant could have been in no doubt as to its nature and purpose as an investigatory meeting. It is clear from the notes that Mr Britton conducted it as such.

4. The email instructing the claimant to attend the disciplinary meeting on the 4th of August 2023 failed to detail the misconduct alleged but merely stated that the charges were that of bullying and harassment of M G and A S without detailing what constituted said bullying and harassment ie what happened when and where.

A further charge was added which was failure to follow a Variation of contract procedure leading to an overpayment of S M.

The claimant has never been provided with the original grievances of MG and AS. The claimant has been provided with the investigation summary of SU but

the complaints about him are put by MG and AS and the other witnesses in quite general terms although the words alleged to be name calling is specified.

5. The Claimant complains of breach in that the respondent failed to provide notes of the investigatory meeting with Mr Britton to the claimant within the usual time frame to enable him to consider and sign off, as expected by the company policy. He did not get the enclosures attached to the outcome letter for 5 weeks because he was unable to open the password protected attachments. To some extent the claimant was the author of his own misfortune because it took him 15 days to alert Mr Britton of the problem. It was clearly unsatisfactory not to provide these documents in good time. However, the claimant secured these documents in enough time before the disciplinary hearing and has not challenged the notes of the investigatory hearing at the disciplinary hearing nor at the tribunal hearing. He has not been significantly disadvantaged by the delay and there is no specific breach of Paragraph 4.7 of the Disciplinary procedure in terms of time scale.
6. The Claimant believes that the investigatory officer Mr Britton had a closed mind having made a promise to MG to dismiss the claimant before the investigation of the claimant had been completed. – “ *In the past it probably has not been dealt with properly. Reassurance that something will be done*” – (Meeting Britton and M G 31st of July 2023). Mr Britton explained to the tribunal and I accept his explanation that he did not have a closed mind and had made no promise to MG that the claimant would be dismissed but intended to reassure MG that his complaint having drifted from September 2022 would be investigated and dealt with appropriately to a conclusion. The claimant did not resign on making this discovery but proceeded with the disciplinary hearing. Although the claimant may have felt that such a comment indicated Mr Britton's intention to dismiss him I find there was no intention on the part of Mr Britton to give this impression and it falls short of being likely to convey that impression on a reasonable reading of that passage.
7. The respondent pressed ahead with the disciplinary proceedings before Mr Clifton's own grievance had been completed in so far as he was entitled to appeal up until 18 October 2023. There is no rule in the disciplinary procedure which requires the grievance procedure to be completed to appeal stage or at all. There was nothing to stop him from raising his complaints about the procedures and conduct of the investigation to date at the disciplinary hearing. The claimant was not disadvantaged by this decision.
8. The claimant also complains that Ms Hale failed to give a proper weight to his witnesses. This allegation had no impact on his decision to resign as he only became aware of the weight she gave to his witnesses after his resignation.
9. The Acas code of practice and the rules of natural justice require that an employee who is the subject of disciplinary procedures should be given

sufficient information about the alleged misconduct to enable him to prepare to answer the case against him at a disciplinary hearing. In this case the letter from Ms Hale dated the 4th of September 2023 inviting the claimant to a disciplinary meeting set out that the allegations were gross misconduct by way of bullying and harassment towards MG and AS and failure to complete the variation of contract documents. Attached to the letter were 10 enclosures comprising the investigation summary of SU and of Mr Britton, a chronology relating to the variation of contract and notes of meetings with 6 employees including MG and AS. The enclosures contain sufficient information to put the claimant on notice of the case against him in reasonable and sufficient detail to answer the charges.

10. In Ms Hale's letter of the 4th of September 2023 The third charge against the claimant is that he failed to complete variation of contract documentation for a person who came into his department and as a consequence that person was overpaid for about four months. The claimant was able to deal with this matter. The parties agree that the responsibility for completing the form did not initially lie with the claimant and it was the responsibility of another manager. However, there is an ongoing monthly requirement that managers verify with payroll the status of their team in terms of hours and rates of pay. The claimant accepts that this responsibility fell to him when this person transferred to his team and admits he did not alert the system that she was working on reduced hours but still on full pay causing the response and financial loss. This was negligence on the part of the claimant and may well constitute misconduct as perceived by the respondent managers but I find this charge to be rather a make weight and would probably not of itself have resulted in dismissal. However, it was properly presented to the claimant and he was ready and able to deal with it and admitted his failure to follow the required managerial practise.
11. The claimant admits calling AS 'my Little Hobbit' but suggests that he did so with her consent as a term of endearment between friends.
There are a number of statements from fellow members of staff who paint a picture of the claimant bullying MG by among other things by calling him names such as skinny boy, half man, Mr happy. The claimant denies this but the respondent managers made a finding from the statements of others before them that he did so.
Other allegations against the claimant include threatening staff including AS and MG with dismissal if targets were not achieved. The claimant accepted that he had linked targets to keeping jobs and from his perspective he had done so appropriately but that was not the perspective of other members of staff who gave evidence or of Ms Hale.
12. The claimant resigned on the 20th of October 2023 before being informed of the decision to dismiss. The parties agree that the contract came to an end by reason of his resignation.
13. Although there were a number of failures on the part of the respondent managers in their conduct of the disciplinary procedures about which the

claimant was entitled to complain I do not find them to be so serious as to be repudiatory and breach the implied term of trust and confidence as at 20 October 2023 when the claimant resigned.

By the time of his resignation the defects had been corrected namely

- The meeting with Mr Britton was clearly converted to an investigatory meeting and conducted as such
- The claimant was provided with all the documentation save for the original grievances and had the opportunity of commenting on them
- He was able to deal with the charges against him notwithstanding the delay between his meeting with Mr Britton and the time when MG first made his complaint in 2022
- The documents enclosed with the letter of invitation to the disciplinary meeting gave sufficient detail of the case the claimant had to answer

14. This being the case I accept the respondent's submission that the real reason for the resignation as of the 20th of October 2023 was the claimant's expectation that he would be dismissed and he decided to resign rather than face dismissal. The claimant has given no evidence of any unfair or repudiatory conduct on the part of Ms Hale during the course of the disciplinary hearing or afterwards which triggered his decision to resign.

15. In summary I do not find that there was a breach of the fundamental implied term of trust and confidence nor any other breach of contract. Further and in the alternative if there was such a breach that was not the reason for the claimant's resignation. The claimant decided to resign rather than be dismissed. In the circumstances the claim for unfair dismissal fails.

16. Miss Hale had gone so far as to draft a letter of dismissal having decided that was the appropriate sanction and asked another manager to deliver it at a meeting in her absence on 20th of October 2023 having concluded that the alleged bullying and harassment had taken place, together with the breach of managerial procedures in relation to variation of contract. There was evidence for the conclusion she reached given the claimant's admissions and the statements of other members of staff. In the circumstances I find that the claimant would have certainly been dismissed on the 20th of October 2023 in any event and that the dismissal would most likely be found to be fair.

Employment Judge O'Neill

Date: 21 March 2024