EMPLOYMENT TRIBUNALS

Claimant: Mr M Crompton

Respondent: MLN Ground Management Ltd

Heard at: Manchester **On:** 21 and 23 January 2020

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person
Respondent: Mr Jaffier (Employment Consultant)

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal against the respondent fails.

REASONS

1. I conducted the final hearing of this case on the 21 and 23 January 2020.

Preliminary Matters

2. The claimant claims that he was constructively dismissed by the respondent and that that dismissal was unfair. It is accepted the claimant resigned by letter dated 29 June 2019. In that letter he sets out his reasons for resigning. They were that he had been assaulted, that the respondent had not followed its own disciplinary procedures and that therefore the respondent was an unsafe working environment.

3. I heard evidence from the claimant in support of his case. For the respondent I heard evidence from Miss Gemma Staves (Administrative Assistant), Mrs Sue Butterworth (HR Consultant) and Mr Matthew Nixon (Managing Director). Each witness had prepared a witness statement and was cross examined and answered questions from me.

4. There was an agreed bundle of documents consisting of pages 1-141. References in this judgment to page numbers are to page numbers in that bundle.

5. Mr Jaffier had produced a draft List of Issues and the claimant agreed that his case was based on the employer being in breach of the implied term of trust and confidence. He also confirmed that the acts by the respondent which he relied on as amounting to that breach were those set out at para 1.6 of the List of Issues. They were:

(a) The claimant being assaulted on the 10 June 2019.

(b) The respondent failing to follow its own disciplinary procedure.

(c) The claimant being made to work in an unsafe environment.

6. At the end of the submissions I heard submissions from the Mr Jaffier and the claimant. Mr Jaffier had also provided written submissions.

7. I gave my judgment and reasons orally on the afternoon of the second day of the hearing. The claimant asked for these written reasons. As I explained to the parties at the hearing they are longer than the oral reasons, because I have added this "Preliminary Matters" section and set out the relevant law more fully than I did in the oral version. Otherwise the judgment and reasons remains as given at the hearing apart from minor typographical and formatting amendments. I apologise to the parties that my other judicial commitments have led to a longer than expected delay in providing these written reasons.

8. In summary, for his resignation to be a constructive dismissal the claimant has to show three things:

(1) that the respondent fundamentally breached his contract of employment;

(2) that he resigned in response to that breach; and

(3) that he did not affirm the contract, for example by delaying too long in resigning after the breach took place.

9. These were the points agreed as the issues I needed to decide as set out in the List of Issues agreed by the parties at the start of the two days of hearing.

10. The term of the contract which the claimant says the respondent breached is the implied term of trust and confidence between the employer and the employee.

The Relevant Law

<u>Unfair dismissal</u>

11. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by her employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

12. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

13. Where an employer has shown a potentially fair reason for dismissal, whether the dismissal was fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The Tribunal has to decide that in accordance with equity and the substantive merits of the case. (S.98(4) ERA). It is not for the Tribunal to substitute its own decision but to decide whether the employer's decision to dismiss was within the band of reasonable responses to the circumstances.

14. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

15. S.118(1) ERA says that:

“Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

16. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

17. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

18. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

19. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

20. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive Dismissal

21. Section 95(1) of ERA explains what a dismissal means. It includes where ”the employee terminates 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” (s.95(1)(c). This is known as “constructive dismissal”.

22. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** the Court of Appeal decided the predecessor of s 95(1)) created a contractual test for determining whether or not an employee had been constructively dismissed. The employee has to show that the employer has fundamentally breached the contract of employment. The Court rejected a “reasonableness” test.

23. After the decision in **Western Excavating**, the courts developed the implied term of trust and confidence (see **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, 670D** (Browne-Wilkinson J - as he then was), approved in **Lewis v Motorworld Garages Ltd [1986] ICR 157** and **Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] ICR 524)**.

24. In **Malik v BCCI SA [1997] ICR 606** the House of Lords (as it then was) confirmed that every contract of employment includes an implied term that the employer should not “without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

25. In **Malik**, Lord Steyn considered and rejected three suggested implied limits on the term. First, at p 623D-E he said that the motives of the employer were not relevant. The question was whether the conduct “objectively considered is likely to cause serious damage to the relationship between employer and employee”. If so, “a breach of the implied obligation may arise”. Lord Nicholls made a similar point at p 611B. He said, “A breach occurs when the proscribed conduct takes place: here, operating a dishonest and corrupt business. Proof of a subjective loss of confidence in the employer is not an essential element of the breach, although the time when the employee learns of the misconduct and his response to it may affect his remedy”. Second, Lord Steyn decided that there can be a breach of the implied obligation arising from actions of the employer which the employee does not know about until after the employment has ended (at pp 624E-625F).

26. The Court of Appeal, in **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, [2010] ICR 908**, confirmed that the test for establishing whether a contract of employment had been repudiated was a contractual test, not a test of reasonableness. In deciding whether or not an employee had been constructively dismissed (in a case where the breach relied on is a breach of the implied obligation to maintain trust and confidence) the test in Malik

should be applied. The test is objective: a breach occurs when the proscribed conduct takes place.

27. Mr Jaffier suggested that in making my decision I should apply the band of reasonable response test to the respondent's conduct. That submission was based on the Employment Appeal Tribunal ("EAT") case of **Barrett v Accrington & Rossendale College UKEAT/0099/06/RN**. However, the Court of Appeal in **Buckland** seem to me to make it clear that that "band of reasonable responses" approach does not apply in deciding whether an employer has fundamentally breached the contract of employment.
28.

29. In **Bradbury v BBC [2015] EWHC 1368 (Ch); [2015] Pens LR 457**, an appeal from a determination of the Pensions Ombudsman, Warren J helpfully summarised the effect of the Malik test in this way:

"The question is therefore whether, objectively, there has been a breach of the implied term. In my view, that objective assessment must be carried out in relation to the implied term read as a whole thus encompassing both elements of that term. Accordingly, the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause. Reasonableness, objectively judged, necessarily comes into establishing whether or not there has been a breach of the implied term. But this is not to apply, by the back door as it were, the "range of reasonable responses" test. It is not a question of establishing whether a particular course of action is within the range of reasonable responses to the particular state of affairs and the situation in which the employer finds itself; rather, the question is whether the particular course of action is a reasonable and proper response to that state of affairs and situation in the context of the implied term so as to prevent what would otherwise be a breach of duty from being one."

30. In **Leeds Dental Team Limited v Rose [2014] I.C.R. 94** the EAT confirmed that the test does not require a Tribunal to make factual findings as to what the actual intention of the employer was because the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention spoken of.

Summary of the case

31. The focus of this case was on an incident on 10 June 2019 involving the claimant and another employee of the respondent, John Flitcroft. The claimant referred to this incident as an assault. The claimant was Mr Flitcroft's team leader, the team being the two of them. The respondent provides ground maintenance service to Lidl, and the incident happened when the claimant and Mr Flitcroft were at the Irlam site.

32. The respondent's witnesses did not refer to the incident as an assault, however it is accepted that Mr Flitcroft had made threats of violence and behaved in a threatening manner towards the claimant, grabbing him and causing him to feel intimidated, alarmed and distressed and to fear the application of personal violence

from Mr Flitcroft. The fact that that is accepted is evidenced by the fact that this is set out in the final written warning given to Mr Flitcroft by the respondent dated 13 June 2019.

33. Given the disagreement between the parties as to whether what Mr Flitcroft did should be classed as an assault, I am going to refer to it in this Judgment as "the incident". That is not intended in any way to belittle what Mr Flitcroft did to the claimant, which Mr Nixon agreed was completely unacceptable.

34. What was not disputed either by Mrs Butterworth or Mr Nixon, two of the respondent's witnesses, was that what Mr Flitcroft did fell within the examples of gross misconduct set out in the respondent's disciplinary procedures and particularly at page 121 of the Tribunal bundle. The final bullet point on that page makes it clear that fighting or physical assault or abusive threatening behaviour is an example of gross misconduct. The respondent accepted that Mr Flitcroft's behaviour fell within this example.

35. The disciplinary procedure says that when it comes to gross misconduct, "in such cases it is considered inappropriate to allow you to continue at work and the only correct penalty would be summary dismissal", which means summary dismissal after a disciplinary hearing.

36. At the heart of the claimant's case was the argument that since Mr Flitcroft's behaviour is accepted to have fallen within the example of gross misconduct in the disciplinary policy, the respondent had to dismiss Mr Flitcroft. The respondent's response is that the disciplinary procedure also says that, "we deal with every case entirely on its merits and undertake that we will always seek to conduct the disciplinary procedure reasonably, fairly and consistently". It says that when it investigated the incident Mr Flitcroft put forward mitigation for his behaviour, namely that the claimant's attitude towards him over the 12 months they had worked together amounted to derogatory and demeaning treatment. The respondent says that whilst summary dismissal would ordinarily be the correct sanction for gross misconduct, in this case the mitigation provided by Mr Flitcroft meant that a lesser sanction was appropriate.

Findings of Fact

37. In terms of findings of fact, there was in reality relatively little dispute about what happened in this case. I briefly set out my findings of fact based on the evidence I have heard.

38. The incident took place on 10 June 2019. When it happened the claimant contacted Blade Brown, one of the managers, about it. Mr Nixon, the Managing Director of the respondent, was on leave at the time. He was rung by Blade Brown on the day of the incident and told him to contact Sue Butterworth who the respondent uses for HR advice to deal with the matter. After the incident the claimant drove Mr Flitcroft back home, a 30 or 40 minute drive. He says he felt he should do so because it was the professional thing to do. The respondent's evidence was that Gemma Staves had been dispatched to pick Mr Flitcroft up.

39. Gemma Staves acted as the investigation officer. The claimant wrote his statement in her presence at around 13:45 and she also contacted the claimant for further information about the incident at about 3.00pm on 10 June. Gemma Staves took a statement from Mr Flitcroft on the same day, and Mr Flitcroft was suspended from work pending an investigation. Gemma Staves' letter of 11 June 2019 confirms this.

40. The resulting disciplinary hearing for Mr Flitcroft was conducted by Mr Butterworth. That hearing took place on 12 June 2019. At that hearing Mr Flitcroft was asked about mitigation for his behaviour and raised the claimant's attitude towards him. Mrs Butterworth's evidence was that Mr Flitcroft initially declined to name anybody who could corroborate his version of events but she pressed him on that by saying that matters were serious and that he could lose his job. He then gave her the name of two fellow workers, Laurie Harrison and Connell Staves. Gemma Staves took statements from them (Connell being her brother) which in Mrs Butterworth's opinion corroborated Mr Flitcroft's evidence about the way he had been spoken to by the claimant.

41. Having considered those statements Mrs Butterworth decided they provided mitigation for Mr Flitcroft's behaviour sufficient to justify giving him a final written warning instead of dismissing him. Mr Nixon confirmed that he had a telephone call with Mrs Butterworth during which he confirmed he agreed with that decision.

42. In terms of that process I note three points which were not disputed:

(1) It involved Gemma Staves taking a statement from a close relative, which is not ideal;

(2) There was no suggestion that the claimant was given any chance to comment on the statements, which in effect made allegations against him;

(3) There was some confusion about when a statement from a third witness, Jamie Paterson, was taken. It is dated 12th but some passages in the letter of grievance outcome (page 71) suggest the statement was provided to Mr Nixon after the claimant raised his grievance.

43. On 17 June 2019 the claimant was at a site when Mr Flitcorft turned up as part of the respondent's "man in van" team which worked across different sites. The claimant's unchallenged evidence was that he removed himself from the situation so that he would not come into contact with Mr Flitcroft. There was no evidence that he called a manager or anyone else to raise an issue about his personal safety on that occasion.

44. Mr Nixon came back from his leave on 17 June 2019. He met with Mrs Butterworth about other matters and at the end of that meeting they decided it would be a good idea to inform the claimant of the outcome of the disciplinary hearing involving Mr Flitcroft. The meeting did not go well. The claimant's evidence, which I accept, was that he felt ambushed. It was the first time he had met Mrs Butterworth and she was from HR. His evidence was that she treated him in a condescending manner. Her evidence, which was corroborated by Mr Nixon, was that the claimant

became agitated and aggressive. Mr Nixon's evidence was that at one point Mr Nixon had to intervene because he thought the claimant was going to stand up in the meeting.

45. I find it understandable that the claimant felt ambushed by that meeting. It was the first he knew the outcome of the action taken against the person who had physically threatened him. Not only was he told that the person would continue to be employed, but he was also being told for the first time that his fellow employees had given evidence about his bad attitude towards Mr Flitcroft. In a way he was being told it was his fault.

46. I find that the intention in holding the meeting was to let the claimant know of the outcome of his complaint, but I also find that he saw it as the respondent making an allegation against him rather than treating him as the victim of the threat of physical violence. I also find that by the time of that meeting Mrs Butterworth had formed a view about the claimant's attitude towards Mr Flitcroft which may have coloured the way that she spoke to the claimant. Having observed her giving evidence I do accept that the claimant may have perceived her attitude towards him as being condescending, however I also accept the evidence from Mr Nixon that the claimant in that meeting was agitated and may have come across as being aggressive. I do find, as I have said, that his response to the meeting was not difficult to understand given what he was being told for the first time.

47. Mr Nixon told me that after the meeting he carried out a risk assessment to reduce the risk of Mr Flitcroft and the claimant working together, and therefore reduce the risk of the claimant feeling that his safety was at risk. Mr Nixon explained that he rang his health and safety consultants and explained the risk perceived by the claimant and the steps he was proposing to take. Those steps included ensuring that managers were aware not to roster the claimant and Mr Flitcroft together, and where possible to make sure that Mr Flitcoft and the claimant should not be on the same site even within different teams.

48. The claimant worked from 18 to 21 June 2019. On 21 June 2019 he wrote to Mr Nixon saying that he feared for his safety and strongly rebutted the decision of the disciplinary hearing and would therefore be taking emergency leave.

49. On 25 June 2019 the claimant lodged a ten point grievance. I will not set it out in full but the grievance included:

- the failure to follow the disciplinary procedure by not dismissing Mr Flitcroft;
- being ambushed at the meeting on 17 June;
- not being permitted to defend himself in regards to the allegations made in the statements from Laurie Harrison and Connell Staves; and
- that there was a level of bias in the investigation.

50. The grievance letter does not refer to his being afraid of his safety at work.

51. The grievance hearing took place on 28 June 2019. There were transcripts in the bundle. The key points I find are that, as the claimant says, the respondent did ask questions about stress and about matters such as his feeling tired at work due to his on-call firefighting duties. However, I accept Mr Nixon's evidence that he asked those questions because he wanted to check the claimant's welfare, in particular given that the claimant had at his own request stepped down from being a team leader for a short period of time on a relatively recent past occasion.

52. I do not feel that those questions were motivated by malice on the part of Mr Nixon, but again I can see how the claimant might have viewed them as further examples of the respondent getting at him rather than acknowledging that, as he saw it, they had got it wrong by not dismissing Mr Flitcroft, as he thought the disciplinary policy mandated.

53. The other point I note is that the transcript of the meeting (at p.79) records the claimant's father confirming that the grievance meeting had been fair. It was left that Mr Nixon would carry out further investigations and get back to the claimant with the grievance outcome.

54. After the meeting the claimant confirmed that he had a phone call with Mr Nixon when he said he wanted to draw a line under matters and move on. When he was offered work on Monday 1 July on WhatsApp he sent a "thumbs up" emoji indicating that he was going to be at work. However, on the following day (29 June) he sent a text to Mr Nixon telling him that he should read his emails, which included the resignation letter.

55. On receipt of the resignation letter the respondent wrote to the claimant giving him a chance to reconsider and referring to the risk assessment and the fact that he would not be rostered to work with Mr Flitcroft. I find the form of wording of that letter (dated 3 July p.53) convincing in terms of the respondent's case that the claimant had been told previously about the risk assessment and the steps taken to prevent him working with Mr Flitcroft.

Conclusions

56. It is important at this point for me to make it very clear what I am and what I am not deciding. I am not deciding whether the employer was right not to sack Mr Flitcroft: what I am deciding is whether the respondent's conduct was calculated and likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant.

57. Dealing briefly with my conclusions in terms of the conduct on which they claimant relied as being a breach of the implied term:

The claimant being assaulted on the 10 June 2019.

58. The claimant refers to Mr Flitcroft's actions on 10 June 2019 as an assault. It is clear that that incident did take place. However, I do not think that the employer is at fault in relation to the assault. The evidence was that Mr Flitcroft's behaviour was out of character. This was not a case where previous threats had been made to the claimant by the perpetrator of the incident.

The respondent failing to follow its own disciplinary procedure.

59. I accept the respondent handled matters badly. Not giving the claimant a right to respond to allegations made about his character seems to me clearly unfair. I accept, however, that the disciplinary procedure, although it normally mandates summary dismissal, does allow the employer a discretion to deal with matters on their particular facts. That seems to me to be reasonable in that there may well be circumstances where conduct which would be gross misconduct is a result, for example, of provocation so that dismissal might not be appropriate.

60. I have referred above to the fact that there were three particular flaws with the disciplinary process carried out. These were Gemma Staves taking a statement from her brother; the three witness statements not all appearing to have been taken on 12 June 2019; and the claimant not being given an opportunity to respond to the evidence in those witness statements. Dealing with each:

(a) the position of Gemma Staves seems to me to be not fundamental in that she was not the ultimate decision maker in these matters. She was not, therefore, assessing the credibility of her brother as a witness but merely taking down what he told her.

(b) in relation to the witness statements, I do think that there is a confusion here: I have considered carefully whether it goes to the issue of constructive dismissal and ultimately decided that it does not. The reason I say that is that at the point when the claimant decided to resign that confusion was not evident.

(c) the more serious breach, it seems to me, is the failure to give the claimant the right to respond to the allegations made against him. I have considered whether that is itself a breach of the respondent's disciplinary procedure, and it seems to me that it is not. The reason I say that is that the disciplinary procedure sets out what steps should be taken in relation to the person who is being disciplined: it does not set out in any detail the rights of witnesses. As I have said, I completely accept that it was unfair not to give the claimant a right to respond. I do not think that that failure in itself, however, is sufficient to amount to a breach of the implied term.

The claimant being made to work in an unsafe environment.

61. When it comes to the claimant being in fear of his safety at the workplace, I have made the following findings.

(a) That the claimant drove Mr Flitcroft home after the incident. I accept that he says that he thought he was behaving in a professional manner, but I find that if he was as in fear of his safety in the workplace as he suggested in his evidence, it is far more likely that he would have waited for someone else to come and pick up Mr Flitcroft or rung the office to ask them again to send someone to pick him up rather than getting back into the van with him.

(b) The claimant saw Mr Flitcroft at work on 17 June 2019 and so by the end of 17 June 2019 at the latest knew that Mr Flitcroft was back at work, but then came back and worked for a further week from 17 June 2019 before deciding to take emergency leave.

62. Based on those findings of fact I conclude that the claimant exaggerated the extent to which he was afraid for his safety at work. However, if I am wrong about that I find that the respondent did take steps to address it. They carried out the risk assessment and, on Mr Nixon's evidence (which I accept) all managers who would be involved in rostering work were told not to roster the claimant and Mr Flitcroft together.

Conclusion on the constructive dismissal issue

63. Stepping back and referring back to the legal question which I must answer. The position in summary is that the respondent received an allegation that there had been an incident; it suspended the perpetrator and carried out disciplinary action against him; that disciplinary action was a final written warning. I find that it did have discretion to decide to do so rather than to dismiss Mr Flitcroft. I find that having decided to report the outcome of the disciplinary procedure to the claimant and listen to the fears he raised about working with Mr Flticroft Mr Nixon did take action to ensure that the claimant and Mr Flitcroft were not rostered together: in other words the employer did take steps to reduce the risk that the claimant perceived to his safety at work.

64. The claimant then raised a grievance and the respondent held a grievance meeting. By the claimant's father's own evidence in the transcript, that meeting was fair. The claimant did not however await the outcome of that grievance: instead he resigned on 29 June 2019.

65. For completeness I do find that the claimant's resignation was nothing to do with a conversation he had with a firearms officer, as alleged by the respondent. I accept the claimant's evidence that any such conversation took place a week or so later rather than immediately after the grievance meeting.

66. The situation, then, was that the respondent had made a decision in relation to a disciplinary matter, had received a grievance from the claimant which it actively considered but had not yet full investigated, and at that point the claimant resigned. The question for me is whether, viewed objectively, at the point the claimant resigned the respondent had conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust. My conclusion is that it had not. Again, I stress that is not to say that I think the respondent has acted fairly in this case, but that is not the question that I am answering.

67. In the circumstances, since I have found that there was no fundamental breach of contract the claimant's claim of unfair dismissal must fail because he has not satisfied me that there was a constructive dismissal in this case.

Employment Judge McDonald

Date: 4 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 March 2020

FOR THE TRIBUNAL OFFICE