



EMPLOYMENT TRIBUNALS

Claimant

Mr J Sargent

v

Respondent

Generator Power Ltd

Heard at: Norwich (by CVP)

On: 22 & 23 July 2020

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Foster (Friend).

For the Respondent: Mr Lewis (Counsel).

RESERVED JUDGMENT

1. The claimant was not constructively unfairly dismissed.

REASONS

1. The claimant brings claims to the Tribunal claiming he was constructively dismissed. In his claim form he asserts “management within the company actively sought to make my position untenable within the company”. The claimant is therefore relying on a breach of the implied term of trust and confidence. The respondent resists the claim.
2. In this Tribunal we heard evidence from the claimant through a prepared witness statement. The claimant called no further witnesses. For the respondent we heard from Mr David Allport, Southern Area Manager; Mr David Hague, National Service Director; Mr Robert McKean, Port Talbot Depot Supervisor and Mr Martin Jauncey, Engineer all giving their evidence through prepared witness statements.
3. The Tribunal had the benefit of a bundle of documents consisting of three sections; A1-A41, B1-B150 and C1-C44.

Findings of Fact

4. The respondent is a company that specialises in the hire of mobile industrial generators and has several depots throughout the UK.
5. The claimant was employed by the respondent on 9 October 2014 as a field based service engineer and was based in the respondent's Hitchin depot. At the time of the claimant's resignation he was employed at the Hitchin depot as lead engineer and his duties included preparation of equipment for hire, loading and unloading of vehicles, carrying out duties on the call out rota system, liaising with the hire desk, carrying out planned service and maintenance work on both hire fleet and customers, and allocating picking lists for the engineers.
6. Originally Robert McKean oversaw the Hitchin depot and the claimant helping out with any matter at the depot that would require a manager's authorisation. Mr McKean would speak to the claimant once a week or more depending on the workload. It would appear there was an easy-going relationship between the claimant and Mr McKean.
7. It is not correct to say that the claimant had no conduct issues, the claimant had been issued with a letter of concern during his employment as a result of a complaint from a member of the public with regards to reckless driving and speeding.
8. In June 2018 there was to be a change of line management of the claimant in that Mr Allport was employed by the respondent as the Southern Area Manager and became the claimant's direct line manager.
9. Mr Allport first met the claimant on Friday 15 June at the Hitchin depot and in attendance was also Mr McKean. Mr McKean describes the meeting as cordial, Mr Allport having introduced himself to both of us the meeting proceeded light hearted and friendly. There was conversation whereby Mr Allport asked the claimant a question about cables and who did the wiring tests on the cable at Reading and Hitchin and naturally explored the claimant's knowledge given the fact that Mr Allport was going to be responsible for line managing him. Further exploration of the claimant's knowledge by Mr Allport clearly showed some concern by Mr Allport.
10. However, Mr McKean's own evidence was the claimant did not seem concerned at all and there is no suggestion that Mr Allport was aggressive or making any comment at any time that he would not have employed the claimant.
11. The claimant did raise an issue regarding his wages at this meeting indicating that he had been promised a pay rise by the former Operations Director who had left the respondent six months prior. Mr Allport explained as this was only his second week with the business he would look into the matter and raise it with Mr Hague. The reason being rates of pay were not within the remit of Mr Allport and he had no authority to authorise any pay rises.

12. Mr McKean has never phoned the claimant to warn him that Mr Allport did not like him or wanted to get rid of him or words to that effect. The claimant did tell Mr Kean that he thought Mr Allport was overly critical of him. Mr McKean accepted that Mr Allport may not like the claimant but informed the claimant that he needed to let matters settle down as Mr Allport was just finding his feet in the new position. There is no evidence that other staff at the respondent informed the claimant that Mr Allport had been openly criticising the claimant.
13. Given the nature of the respondent's business it is obliged to meet certain service levels with its customers.
14. It is accepted during the summer of 2018 there were a number of staff absent from the Hitchin depot. So, to avoid undue work levels, the on-call rota was covered by the remaining staff at Hitchin and was shared with the Reading Depot for an on-call engineer when necessary. In fact, Mr Allport arranged for a Josh Jones to assist the claimant during this period. It was also during this period that the respondent was actively recruiting staff for the depot and the respondent having to wait for the new recruits given their notice periods.
15. The claimant simply was never asked or forced to work 24 hours a day, every day throughout the summer months and the claimant's timesheets in the bundle before the Tribunal today clearly suggest this is not the case.
16. It is also not the case that the claimant was forced to come into work on his day off to collect the property of another member of staff who was leaving. The claimant volunteered to go to the depot to carry out the leavers interview.
17. During the bank holiday week, the claimant's colleague Ben Humphreys was on-call for the Hitchin depot unfortunately the respondent's duty manager was unable to contact him. As a result of this Mr Allport was contacted by Mr Cardwell the respondent's Managing Director enquiring why there was nobody on-call. In turn Mr Allport attempting to contact the claimant who at the time was not on a pre-booked holiday and had made apparently no arrangements for cover despite this being the claimant's responsibility. Mr Allport subsequently emailed the claimant enquiring why there was no cover, the claimant called Mr Allport and blamed him for not arranging cover despite the fact it was clearly the claimant's responsibility.
18. It is accepted again at the end of August it was a busy period, the claimant went off sick on 29 August the result of which Mr Allport based himself in the Hitchin depot and arranged for an engineer from Reading also to base himself at the depot.

19. The claimant would have been fully aware that the respondent had a new engineer starting Mr Murphy, the claimant being involved in the interview process. There was a delay in him joining because Mr Murphy was required to work out one months' notice before he could start with the respondent. The respondent was also able to recruit a Mr Jauncey who had a shorter notice period. Their wages reflected the skill and qualifications, the respondent's pay structure is not based on time served. Clearly the respondent would not deliberately delay recruiting the new staff intentionally as that would in turn cause significant damage to the respondent's business being unable to meet the contractual service level they were bound to provide to their customers.
20. It is clear Mr Allport would regularly discuss depot operations with the claimant, a necessary part of Mr Allport's role as a manager and to ensure that the depot worked effectively. B58-B62 and B65-B69 support the fact that these meetings were friendly and good natured.
21. In October following various meetings and discussions with the respondent's directors Mr Allport became aware that across the business excessive overtime had been worked. This was raised with the supervisors at both Reading and Port Talbot to consider whether all the overtime being worked was in fact necessary. Mr Allport being aware that the claimant had been signed off by his doctor for work related stress and exhaustion. He was also aware that the claimant was working a lot of overtime on administration issues which Mr Allport considered could be performed during the claimant's contractual hours. No other depot supervisors were working excessive hours performing administration work as overtime. Mr Allport therefore emailed the claimant partly for health reasons, partly for reasons where the overtime was unnecessary that he wanted the claimant to reduce the unnecessary hours he was working in an attempt to alleviate future exhaustion (page P75).
22. On 15 October the claimant resigned by letter (page P76), the letter reading:

"I am writing to you today to formally tender my resignation from my position at Generator Power as you are aware this is due to the untenable situation which I have been placed in.

With my two weeks' notice period my last day of work will be Friday 26 October 2018. I would like to thank everyone at Generator Power for my time here.

Yours sincerely

James Sargent"
23. The claimant was then placed on garden leave after discussions with the Commercial Director and the respondent's Managing Director (page P77).

24. In respect of the claimant's pay it was identified after he had left that there had been errors made and that took some 3 weeks to sort out. It was an administrative error and not a deliberate attempt to withhold pay from the claimant.

The Law

25. It is true that the legal test for a breach of contract is a high hurdle to overcome. The breach must be fundamental or repudiatory.
26. In the well-trodden and well-known case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, it reminds Tribunals that we must be satisfied that an employer committed 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".
27. In other words, the conduct must be sufficiently serious to entitle the employee to leave at once.
28. In Malik v BCCI [1997] IRLR 606 the House of Lords provided a formulation of the implied term:

"The 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."
29. In addition to the high hurdles any claimant faces in establishing a fundamental breach the test to be applied is an objective test.

Conclusions

30. Dealing with general observations regarding the evidence, particularly the claimant's, it is true that the claimant had issues as to the reliability of his evidence and credibility. The claimant accepted that in submitting his claim form it was an important document, in that he said in the claim form that during his employment there had been no conduct issues. That was clearly inaccurate as the claimant had been issued with a letter of concern by the respondent regarding a serious complaint from a customer over the claimant's reckless driving.
31. The Tribunal also felt that the claimant had a tendency to exaggerate, for example the suggestion that he was working 24/7 for months in the summer of 2018 was clearly a substantial exaggeration. As when one looks at the facts and the timesheets during that period it is clear from the timesheets from 24 June 2018 to 21 September 2018 the claimant was on-call approximately 6 days during this period. The rest of this period was covered by various colleagues. It is clearly supported at B11-B38, B41-B44, B48-B49, B51-B57 and B63-B73.

32. It is also true on many occasions, the claimant accepted in cross examination that he could not remember the details of relevant conversations usually when it was unhelpful to the claimant's case. However, where the claimant thought it was helpful to his case he would be able to remember in detail such conversations.
33. Indeed, the evidence of Mr McKean which is consistent with that of Mr Allport particularly what happened at the first meeting between Mr Allport and the claimant. Furthermore, the evidence of Mr McKean about the meeting, the first one with Mr Allport and the claimant was not directly challenged in respect of important matters which the claimant had originally alleged namely that Mr Allport was wagging finger at the claimant, saying things aggressively and would not have employed him. Furthermore, the Tribunal takes the view that the claimant's account of the first meeting is implausible as there was no complaint at the time and had the meeting been conducted in the way that the claimant asserts one would have expected the claimant to raise this at an early stage.
34. It is also clear that the claimant had enjoyed a good working relationship with Mr McKean relaxed management style who interfered with the running of the Hitchin depot very rarely. That clearly changed with the appointment of a new manager who wanted to improve efficiency and understand the capability of the staff employed there.
35. In respect of the claimant's alleged promise of a pay rise by a previous director, again that was not put to any of the witnesses and Mr Allport when it was raised with him quite rightly at the first meeting said he would raise it with the appropriate authorities as it was not within his power to authorise pay increases.
36. The suggestion that the claimant was overworked over the summer of 2018 is clearly not supported by the documents and the timesheets. Furthermore, at this time the respondent was actively trying to recruit staff and did so with the claimant's knowledge.
37. In relation to the overtime that the claimant had been undertaking, the email asking the claimant to stop was not unreasonable particularly as at the relevant time the claimant was having issues with work stress. There was no suggestion that further overtime would be prevented by Mr Allport providing it was pre-authorized.
38. It is interesting that in the claimant's letter of resignation he offers 2 weeks' notice, rather at odds with someone suggesting that management had made his position within the respondent untenable and ends up thanking everyone for his time at the respondent, again not consistent with someone who believes the respondent is behaving in such a way as to force the claimant out.

39. Taking all matters into account, the alleged conduct said to have been taken by the respondent upon which the claimant relies upon has simply not being proven, and in any event, is not sufficient to cross the appropriate hurdle and the Tribunal takes the view that in any event the respondent had reasonable and proper cause for the way they conducted themselves.
40. Therefore, objectively viewed there is no repudiatory breach of contract and accordingly the constructive dismissal claim fails.

Employment Judge Postle

Date: ...6th October 2020.....

Sent to the parties on: 13th Oct 2020

.....T Yeo.....

For the Tribunal Office