



EMPLOYMENT TRIBUNALS

BETWEEN

NATHANIEL BROOKS

Claimant

AND

AUTOMOBILE ASSOCIATION DEVELOPMENTS LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON BY VHS

ON

30th and 31st August 2022

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: Mr J Fireman of 42 Bedford Row

For the Respondent: Ms G Holden of 3 Paper Buildings

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair dismissal is dismissed

REASONS

1. In this case the claimant Mr Brooks claims that he has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 180 pages plus one additional disclosure, the contents of which I have recorded. The order made is described at the end of these reasons.

3. I have heard from Mr Fireman on behalf of the claimant, and I have also heard from the claimant and his wife as witnesses. I have heard from Ms Holden on behalf of the respondent and both Mr Simon Drown and Mr Gavin Creaney from the respondent company as witnesses on its behalf.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Claim

5. The claimant alleges that he resigned in response to a breach of the implied term of “trust and confidence” and a “last straw” act. He has argued that the breaches comprised seven separate breaches, the final one of which constituted the last straw act.
6. These seven alleged breaches were:
 - a. Additional workload following a redundancy process in 2019, resulting in extensive travel across a wide geographical area and increased workload;
 - b. Consistent failure to provide him with meaningful support despite calling his manager in March 2021 and explaining the extent of his difficulties;
 - c. Consistent failure to provide support generally from late 2020 until his resignation, despite extensive workload, difficulties in personal life including a burglary and death of his brother and the making of a flexible working request;
 - d. Failure to replace team members throughout and taking inadequate steps to recruit staff, leaving him thinly spread, in regular need of cover for his team and having to take on the responsibilities of his team leaders;
 - e. In or around May/June 2021, failure to inform him of the respondent’s willingness to allow online interviews for recruitment purposes, meaning he continued to lack the necessary support to provide the services required of him to a professional standard;
 - f. Exclusion from two social motorbiking events at which the rest of the management team was present, on the second of which he worked a full shift whilst his colleagues socialised; and
 - g. On or around 23 June 2021, Mr Creaney taking over the process of interviewing staff for one of his areas – Reading – without involving or informing him and Mr Creaney also arranging cover for one of his teams in the Hinkley without informing him
7. I make findings of fact in relation to each of these below.

Facts

8. The claimant joined the respondent on 3rd January 2019 as a regional operations manager in the AA cars division. It is agreed that he was an employee and had the benefit of more than two years’ continuous service.
9. The claimant’s contract of employment provided that he was a field worker and “may be required to travel within the UK as part of your role”. I find therefore

that there was an expectation within the role that the claimant would have to travel and that there was no regional limitation to this.

10. Initially there were three regions for England and Wales, with the claimant leading the southern region. However, the respondent carried out a redundancy programme in August 2019, reducing the number of regions from three to two, with the claimant appointed manager for one of the two new regions. Mr Creaney was the other manager. Both reported to Mr Drown.
11. The claimant has questioned the legitimacy of the redundancy process, for example claiming that one consultation meeting for which minutes were produced did not occur. He claimed the process was a foregone conclusion but did not raise any issues at the time. He now claims that the new region covered a much larger area, but he felt he had no choice but to accept. On balance and based on the evidence, I do not find any defects in the process or issues in relation to the change in the claimant's role, which I find he willingly accepted.
12. The claimant has alleged that the new role led to additional workload arising from the wider geographical area and increased responsibility. I find that the level of travel required would have increased. However, the requirements to travel were not materially more onerous and the claimant had accepted these in agreeing to the new role. As a result, I do not find any breach by the respondent by giving the claimant the new role.
13. The pandemic affected the respondent's business, making site visits more difficult and also leading to a loss of staff across the business. There is a dispute as to the veracity of the respondent's evidence showing the levels of visits carried out by the claimant and Mr Creaney. Although questioned by the claimant, I find nothing to suggest that the evidence here has been altered and so accept its veracity.
14. In October 2020, the claimant sadly experienced a burglary. Amongst items stolen was his company BMW. The only replacement immediately available was a sub-standard Nissan. Mr Creaney did seek to assist obtaining a more appropriate replacement, but I do find here that the provision of an unsuitable car was a breach by the respondent.
15. In the same month, the claimant's brother sadly died. Mr Creaney and Mr Drown were both with the claimant when he learnt of the loss, and I find that Mr Drown offered support both then and subsequently. It is clear that the claimant is a private person who did not readily seek support. However, I am satisfied that, based on their awareness, they offered as much support as would reasonably be expected in the circumstances.
16. In February 2021, the claimant made a flexible working request, effectively asking to do the same level of work but over four not five days. This was to assist with childcare and looking after his mother. This request was refused. However, I do find that the process followed was fair and appropriate and the decision reasonable. I do not find that there was any failure to support the claimant by refusing the request, which was based on proper and appropriate business considerations.
17. On 8 March 2021, the claimant visited Mr Drown at his home to discuss concerns about his workload. These concerns arose from resourcing issues within his team due to departures. These were issues experienced by the respondent across its business. Whilst it is clear it would have presented challenges, I find that the Mr Drown was aware of these and was seeking to address them.

18. The claimant alleges that no action was taken by Mr Drown as a result of the meeting, arguing that this amounted to a breach by the respondent. He also alleges an ongoing lack of support from then and until his final resignation. The claimant expected an action plan to be produced and cites that failure as evidence of these breaches. Whilst there may have been no express action plan, I find that support could nonetheless be provided without one. I find that both Mr Drown and Mr Creaney were providing support to the claimant from then until his final resignation, for example by Mr Drown taking on responsibility for recruitment and reducing the regional responsibility for the claimant and by Mr Creaney providing cover for the claimant. The South Wales and the South West areas were taken over by Mr Creaney from the claimant. A difficulty here is that the claimant objected to the help being given whilst claiming a lack of support by reason of the absence of an action plan. I find the claimant's objections unhelpful to his own position.
19. I therefore find there was no consistent failure to provide the claimant with meaningful support from late 2020 until his resignation, with the exception of the failure to provide a suitable replacement car for the stolen BMW. I do not find that this amounted to a fundamental breach of contract.
20. Similarly, I do not find that there was any failure arising from the recruitment difficulties. The respondent was doing its best to address the issues, looking at alternative ways to fill roles and, through Mr Drown and Mr Creaney, providing reasonable support for the claimant. Although there were pressures on the claimant and others to perform when there were gaps across the teams, this did not amount to a breach of contract.
21. The claimant has alleged that the fact that he believed that interviews had to be held in person when in fact in May/June 2021 at least one occurred online was evidence of a breach, arguing that the failure to inform him amounted to a breach by preventing him performing his role. It is clear that the preference was for in person interviews but online was used to assist with the recruitment difficulties. In addition, by this time Mr Drown had taken on the recruitment responsibilities from the claimant. I find that there was no breach by the respondent; this is another instance where it was acting to support the claimant, who was in return alleging this constituted a lack of support.
22. On 24th April 2021, Mr Drown and Mr Creaney attended a performance motorbike event forming a team with and at the invitation of a third party; this was a Saturday and not a workday. A third member of the management team - Richard Sanders - also joined them at the last minute to provide assistance but was not part of the team for the event. I find that this event was wholly unconnected to work and was not something to which the claimant should expect to be invited. Mr Sanders was only there to address a last-minute issue. The claimant was not excluded as it did not relate to work. There was no breach resulting from the fact that he was not invited.
23. The claimant resigned on 11th May 2021 on the grounds of the lack of support received but rescinded that resignation four days later on 14th May 2021, having spoken to Mr Drown and being provided with comfort that his issues were being addressed.
24. A management meeting occurred offsite on 10 June 2021 in Buxton, attended by Mr Drown, Mr Creaney and the claimant. It is clear at the event that Mr Creaney helped the claimant with certain IT issues he was experiencing. The participants stayed overnight except the claimant who chose to leave early,

citing the lack of an action plan to address his issues. Mr Drown had suggested the participants went for a social motorbike ride as part of the event but timings meant that was not possible. The claimant had objected to this as he did not have a motorbike at that point.

25. The following day Mr Drown and Mr Creaney rode their bikes to the motorway (about 20 miles) and then headed home separately. The claimant alleges that this was the proposed social ride and that he was excluded from this. However, I find, on the balance of probabilities, that this was not a social ride, the participants merely travelled together for the initial part of their journey. There was no exclusion of the claimant as it was not an organised event and the claimant had in any event chosen to leave early. Travel home from a work event was a legitimate activity at the respondent and so the fact that the claimant was himself working that day is irrelevant. I accordingly find that there was no exclusion of the claimant from any event and so no breach as a result of this ride or the claimant's absence from it.
26. The claimant alleges that around 23rd June 2021, he believed that Mr Creaney was organising interviews for a potential recruit in Reading without informing him. This area lay between the region covered by the claimant and the new areas taken over by Mr Creaney and so was not the claimant's area. The claimant has alleged he was being excluded from the recruitment process and was not informed about the alleged interview. However, it is clear that the claimant was still being informed about relevant recruitments; the examples he has given of exclusion are from areas where he was not involved anyway. In this case, I find that there was in fact no interview, the claimant was sufficiently informed about what was happening and I accept Mr Creaney's evidence that no hiring would have taken place without the claimant's involvement, until his resignation. I find that there was no breach by the respondent in relation to this recruitment.
27. Around this time, Mr Creaney also provided cover for a site in Hinkley. The client had attempted to contact the claimant but could not reach him and so contacted Mr Creaney, who provided the requested cover. Mr Sanders was also now assisting with this site. The claimant's complaint is about not being informed and his perception the site was being taken over. I find that there was no breach, this is just another example of support being provided to the claimant by the respondent.
28. He resigned again on 24th June 2021, giving three months' notice. He cited as his reasons being stretched too thinly and the lack of support to deal with his large geographical coverage. He stated that he was now in an untenable position and could not carry on without his health and personal life being unduly affected. I find that his perceived lack of support was the principal reason for his resignation.
29. The claimant began gardening leave on 16th August 2021 and his employment ended on 24th September 2021.
30. The claimant did not raise any formal grievance in relation to any of his concerns at any point.

Law

31. Having established the above facts, I now apply the law.

32. Under section 95(1)(c) of the Employment Rights Act 1996 (“the Act”), an employee is dismissed if he 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. It is agreed that the claimant is an employee who can benefit from this section.
33. If the claimant’s resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides “... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.
34. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects (“UHA”) v Gyftaki UKEAT/0278/18/RN. [implied term health and safety/stress] Marshall Specialist Vehicles Ltd v Osborne [2003] IRLR 672 EAT and Sutherland v Hatton [2002] IRLR 263 CA.
35. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: “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 his employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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. He will be regarded as having elected to affirm the contract.”
36. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: “... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person

in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.”

37. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.
38. In this case, the claimant is claiming that the breach is one of the implied term of mutual trust and confidence. Any breach of this will be treated as repudiating the contract of employment. The test was set in the case of Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL as neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
39. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that 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; see Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.
40. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”

41. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
42. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
43. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

Application of law

44. Applying this to the facts in this case, I have found that the only individual breach committed by the respondent was in relation to the provision of a replacement car and this alone did not amount to a fundamental breach of contract.
45. I have also considered whether the issues raised by the claimant in relation to the respondent’s behaviour could nonetheless amount cumulatively to a breach of the implied term of mutual trust and confidence. In answering this, I have considered the Malik test of whether the respondent has without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and the claimant. The claimant has alleged that it has, by failing to provide him proper support to deal with his workload. He wanted the provision and implementation of an action plan, and none was provided. Instead, he saw steps taken to undermine him by reducing his geographical spread and reducing his involvement in recruitment. He was also being excluded from management team events. From a subjective viewpoint, his position became untenable as a result.
46. However, it is clear that this test must be applied objectively. From the perspective of a reasonable person, with the exception of the provision of the replacement car, support was provided at every stage, and he was still very much involved in all relevant activities, including recruitment. The absence of a written action plan was not evidence of a lack of support and the actions taken to support him more than outweigh this. The failure to provide a suitable

replacement car did not amount to a conduct calculated or likely to destroy the relationship of trust and confidence between the parties. The various events and issues taken together do not amount to a breach of the implied term.

47. The claimant has argued that the “last straw” doctrine set out in Kaur applies here. That case lists four questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (i) 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? (ii) Has he or she affirmed the contract since that act? (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? (iv) 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? (v) Did the employee resign in response (or partly in response) to that breach?
48. Taking these in turn:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation? The claimant has argued that this comprised on or around 23 June 2021, Mr Creaney taking over the process of interviewing staff for the Reading area without involving or informing him and Mr Creaney also arranging cover for one of his teams in the Hinkley without informing him.
 - b. Has he affirmed the contract since that act? He resigned promptly after the most recent act and so has not delayed in resigning. The giving of three months’ notice will not have affirmed the contract as section 95(1) makes it clear that this applies to termination “with or without notice”. I find that the contract has therefore not been affirmed.
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract? I have found that it was not.
 - 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? Again, I have found that it was not.
 - e. Did the employee resign in response (or partly in response) to that breach? I have found that the resignation was in response to the relevant acts although I have also found that these did not amount to breaches.

Decision

49. I therefore find that there was not a breach of the implied term of trust and confidence. As a result, I find that the claimant was not constructively dismissed and therefore dismiss his claim for unfair dismissal.
50. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 8 to 30; a concise identification of the relevant law is at paragraphs 31 to 43 and 47; how that law has been applied to those findings in order to decide the issues is at paragraphs 44 to 46 and 48.

Case Number: 1404842/2021

Employment Judge H Lumby
Date: 15 October 2022

Judgment sent to Parties: 20 October 2022

FOR THE TRIBUNAL OFFICE