



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Michael Sullivan

v

Anglian Windows Limited

Heard at: Norwich

On: 28, 29 November 2022
2, 3 December 2022

Before: Employment Judge Postle

Members:

Appearances

For the Claimants: Mr Emslie-Smith, Counsel

For the Respondent: Mr Ashley, Counsel

RESERVED JUDGMENT

1. The Claimant was not constructively dismissed.
2. The Claimant was not automatically unfairly dismissed for Health and Safety Reasons.
3. The Claimant's claim he suffered detriments when raising Health and Safety issues is not well founded.

REASONS

BACKGROUND

1. The Claimant brings two claims to the Tribunal, one that he was ordinary unfairly dismissed under s.98 of the Employment Rights Act 1996 ("ERA") and the second that he was automatically unfairly dismissed on the grounds of health and safety, pursuant to s.100(1)(c) and (e) ERA 1996.
2. In the case of the unfair dismissal, constructive, the Claimant says the Respondent's conduct amounted to a fundamental breach of contract, the Claimant relying upon Clause 21 of his Employment Contract; the implied

term of trust and confidence and the implied term to provide a reasonably suitable work environment, the implied term to act reasonably in dealing with matters of safety and finally the implied term to afford a reasonable opportunity to obtain redress to grievances.

3. In relation to the automatic unfair dismissal claim, the detriments relied upon are as follows:-
 - a. On 30 March 2021, being sent to the Manager's office;
 - b. On 30 March 2021, thereafter, being treated in a manner that makes him feel anxious by:
 - i. Ms Bulton-Dowd saying on 30 March, "*you will work where we tell you to work, if you go home we will start disciplinary action against you*";
 - ii. On 31 March 2021, Kerry Parker saying in an email that the Claimant's current absence was classified as unexcused absence;
 - iii. On 1 April 2021, Kerry Parker sent an email to the Claimant in which it was stated, "*your absence will remain unexcused until such time as you make contact with us to confirm the reason for your absence or your return to work*"; and
 - iv. Notwithstanding Kerry Parker acknowledging receipt on 7 April 2021 of the Claimant's email of 5 April 2021 (in which he raised issues about his underlying health conditions and wanting to understand what measures are being taken to address them and Ms Parker saying that she would read through the email in the next few days), the Claimant received no response until 25 April 2021;
 - c. From 30 March to 15 May 2021, a lack of support and communication from the Respondent, namely:
 - i. Respond to emails dated 6, 8 and 16 April 2021;
 - ii. To address the Claimant's issues; and
 - iii. To address the Claimant's Grievance.
4. In this Tribunal we heard evidence from the Claimant through a prepared Witness Statement.
5. For the Respondents we heard evidence from Mr Richardson, an Area Manager, Ms A Bulton-Dowd, Head of Continuous Improvement and Ms Parker of HR; all giving their evidence through prepared Witness Statements.
6. The Tribunal also had the benefit of a Bundle of documents consisting of 526 pages.

THE FACTS

7. The Respondent is one of the UK's leading manufacturers, supplier and installer of home improvement products such as windows, doors, conservatories and similar products. The Claimant has worked for the Respondent since around June 2003 working on the 'door line', manufacturing PVC doors. As is well known in 2020 England went into lockdown as a result of the Covid-19 pandemic and the Claimant had an underlying health condition, diabetes, and was furloughed until around September 2020.
8. Around 2014, the Claimant appeared to work in the Fabrications area and transferred to this department as part of a flexible working arrangement. It was also well known to the Respondents at the time that the Claimant had a fencing business and had carried out that business for a number of years. It was in August 2014 the Claimant had requested to reduce his hours to working two days per week as part of a flexible working request for childcare arrangements and also to operate his fencing business to supplement his income. It was also known that the Claimant was working his fencing business whilst he was furloughed, although originally the Claimant denied this during cross examination.
9. When the factory returned to work in May 2020 following the Covid-19 shut down, the Management Team held a meeting to consider how best to prepare the Unit for the employees' return. Following guidance from the Government, the Respondents operated different start and finish times, one way systems, installed sanitisers and social distance.
10. The staff were originally brought back in three waves: the first in June, the second July and the last around the end of August. The last staff to return were those considered higher risk although not shielding, of which the Claimant was one. As staff returned they were all taken through the changes, the new processes and what was expected of them as employees. It is of course accepted that although measures put in place were generally observed by employees, there were occasion when employees either forgot to socially distance or use the sanitiser. Indeed, the Respondents had an unplanned visit by the Health and Safety Executive who reported that they were impressed with what they had seen and indeed, further, they commented that the Respondents were a leading example in terms of Covid-19 response.
11. On the Claimant's return, he was informed by Mr Barlow (Supervisor) that the factory had been divided into zones which were colour coded and employees were assigned to each zone and would start at different times, have their breaks at different times and finish at different times. Normally, the employees would remain in their zone for the whole week. The Claimant's normal workplace was upstairs on the 'door line'.
12. It is accepted, in January 2021 the Claimant was informed by his Supervisor that he was needed to work downstairs. The Claimant agreed

to undertake this work, but it is accepted he was concerned and did raise concerns about a colleague Mr Bull who had tested positive for Covid a few days prior to this and had been working downstairs on the 'door line'. The Claimant was informed that the downstairs area had been cleaned as a result of an employee being tested positive for Covid, namely Mr Bull.

13. Around the beginning of February 2021, the Claimant noticed he was no longer receiving payments for being a First Aider, apparently those in the factory that were registered First Aiders would receive extra payments. The Claimant raised this with Mr Richardson who was going to speak to HR. When the Claimant did not hear anything from HR, he emailed HR directly and the Claimant was advised that Mr Richardson was asked to rebook the Claimant on a refresher First Aid Course as his certificate had expired.
14. It would appear, Mr Richardson overlooked or forgot to rebook the Claimant and once this was raised the Claimant was rebooked on the first available First Aid Course.
15. On 30 March 2021, the Claimant arrived at work around 8.15am when he was informed by Mr Graham he was required to work on the 'window line'. The Claimant raised concerns with Mr Graham as this was a different area to that which the Claimant had been working in. The Claimant did not work on the 'window line' as instructed, he began working on the 'door line'. Around 8.45 Mr Graham again raised with the Claimant he was needed to work on the 'window line'. Mr Graham informed the Claimant that if he was unhappy with this he would have to go and speak with Mr Richardson who was in his office.
16. On that date, namely 30 March 2021, the Claimant went to Mr Richardson's office but in fact he was in Ms Bulton-Down's office. The Claimant stood in the doorway and Mr Richardson asked the Claimant if he was okay, whereupon the Claimant commenced his query about having to move working areas. He proclaimed he was,

"fucked off because I have been moved to fucking windows".

Further, that

"I am not fucking going".

17. The Claimant was asked to stop swearing and to calm down, whereupon he pointed at Mr Richardson and said,
"As for you, you'll fucking stitch me up".
18. The Claimant again was asked to stop swearing.
19. Ms Bulton-Down at this stage moved from her desk and joined Mr Richardson asking for the Claimant's name and explaining that she was the Unit Manager and advised the Claimant that she / the Respondents

would move the manpower where it was needed according to the demands of business. The Claimant then responded,

"I am not fucking doing it"

And said if he was moved that he would,

"fucking go home."

20. The Claimant was reassured that the task he had been given was safe from Covid because it was a lone worker job and there was appropriate social distancing in place. The Claimant was clearly agitated and not prepared to listen. The Claimant continued swearing and pointing in an aggressive manner, whereupon he was told by Ms Bulton-Down,

"Get out".

That was a reference to get out of the office and not to get off the site.

21. The Claimant responded by saying he was going home. The Claimant was informed that if he left the site it would be regarded as an unexcused absence and he would be taken down the disciplinary route.

22. It appears the Claimant then, left the site without permission and without informing any other person or his Supervisor.

23. It was on 30 March 2021, around mid-day, Ms Parker became aware of the incident having received a telephone call from Unit 13's Management Team advising that the Claimant walked off site during shift.

24. The Claimant emailed the general HR email address seeking clarification of whether he had been suspended (page 172).

25. Lucy Farman an HR Admin Assistant replied on 30 March 2021 (page 171),

"Can I ask the name of the person who asked you to leave?"

26. On 31 March 2021, Kerry Parker an HR Advisor, wrote to the Claimant by email (page 170),

"I confirm as per your request below that you were not suspended from work following the events of Tuesday 30 March and as such were anticipated to return to work today Wednesday 31 March.

I write to confirm that your current period of absence will be classified as unexcused absence.

Investigation into the events that took place on Tuesday 30 March leading to your exit from site are being carried out by the Management Team within Unit 13. You are required to give a statement of the events from your perspective, this statement will be taken by Leon Huckle the Continuous Improvement Manager who is leading the investigation.

This email is confirmation you are required to return to work with immediate effect and by no later than the start time of your shift on Thursday 1 April.

If you have any further questions please do not hesitate to contact me on the information below, I also left a voice mail on your home phone number earlier today which gives my contact information.”

27. Following the above email, the Claimant telephoned Ms Parker in which he was apparently agitated and set out his version of events and that he was finding the situation stressful. The Claimant was reminded of his need to provide a statement. There was a follow up email to this effect by Ms Parker on 1 April 2021 (page 169).
28. The Claimant did not respond until 5 April 2021 when he emailed Ms Parker his statement (pages 169 - 180). The Claimant then sent a further email on 6 April 2021 with further information (page 196), and a further email on 8 April 2021 (page 197). Those emails were information regarding an event on 11 January 2021 where two employees had left work with suspected Covid before the Claimant had started working in the area, and further information about shielding and health issues in relation to Covid, but nothing very specific. Ms Parker then passed the statement to Gemma Crane, the HR Manager, on 9 April 2021 to progress the investigation as Ms Parker was changing business areas.
29. On 16 April 2021, the Claimant sent an email asking for an update, for reasons best known to the Claimant, he sent the email to the general HR email box rather than directly to Ms Parker which caused inevitable delay in the email coming to her attention (page 199). In any event, at that stage Ms Parker had stopped working for the Manufacturing Division and had moved to a new department.
30. The matter in the meantime was being investigated by Gemma Crane who subsequently left the business on 14 May 2021.
31. In the meantime, out of the blue the Claimant emailed Ms Parker on 25 April 2021 at 2039 (page 203) in which he wrote,

“I write further to my emails of 5th, 6th and 8th, 16th in respect of events leading up to 30th March and subsequent formal Grievance. You have acknowledged receipt of my Grievance on 7th April however I have received no further contact from you since that date despite the Grievance Resolution Policy stating I will be contacted within five working days to resolve my concerns.

In addition despite submitting all appropriate fit notes to cover my sickness absence up to and including 26th April I have not received payment in line with my contract of employment.

Therefore I feel I have no alternative other than to tender my resignation giving one week's notice from today's date and to file a complaint with the Employment Tribunal for constructive unfair dismissal and non-payment of wages.”

32. Ms Parker responded on 28 April 2021,

“Further to your email dated 25th April of which I acknowledged on Monday 26th April, I am now in a position to respond to your comments regarding your sick pay. I can confirm that on Thursday 29th April you were paid for your absence period during 11th April to 17th April. It is my understanding from your previous email correspondence that you intended to self-certify your absence from 31st March for seven days ending on 7th April. There are then three waiting days applied before SSP can be paid which means that payment is due from 11th to 17th April as outlined above. Unfortunately, payroll did not receive your fit note until Thursday 22nd April which unfortunately missed the deadline of midday on Wednesday for processing payments the following week. You will know weekly paid employees are paid every Thursday a week in arrears, as such the payment has been processed and will be paid this week.

Following my email on 7th April to acknowledge your Grievance, there have been some internal changes in the HR Team along with Annual Leave which has unfortunately caused delays in processing some case work. I sincerely apologise for this delay and that you have subsequently felt it necessary to submit your resignation. It is still the Company’s intention to investigate your Grievance and as such I would like the opportunity to engage you in the Grievance Resolution procedure and arrange for a Hearing to take place so that your Grievance can be formally heard and investigated by an independent Hearing Manager. You would not be required to attend Unit 13 premises, the Hearing could be held at Unit 30 or 59 Hurricane Way, Norwich. If you are prepared to attend the Hearing I would like to arrange for this as soon as possible, confirming the arrangements for the Hearing within the next five days.

To date I have not processed your resignation, however if it remains your intention to resign following this email, then of course I will progress the necessary paperwork taking into account your notice given from Monday 26th April which is the first working day following your email.

*Kind regards
Kerry
HR Advisor”*

33. Ms Parker was surprised that the Claimant had emailed her as she had moved to the Sales Division. As far as she was aware Ms Crane was progressing the Claimant’s Investigation / Grievance.
34. The Claimant replied to Ms Parker’s email on 30 April 2021, containing his desire to resign (page 202) and therefore his resignation was processed.

Witness Credibility

35. The Tribunal were satisfied that the Respondent’s witnesses were reliable and clear in their recollection of events. Whereas the Claimant was plainly dishonest in giving his evidence, particularly the Claimant has said in his Schedule of Loss that as a result of the Respondent’s behaviour he set up his own fencing business. He repeats that a number of times in his

Schedule of Loss and in the completed Claimant's Agenda for the Case Management Hearing. However, that is plainly untrue. As it transpires, the Claimant was running the fencing business from 2014 and admitted during the course of these proceedings receiving cash payments, thereby defrauding the HMRC as these were not disclosed in his accounts.

36. The Claimant was plainly disingenuous about the conversations he had had with Mr Richardson. At one stage suggesting he had had a conversation, in paragraph 15 of his Witness Statement, in January 2021 about working hours. Under cross examination he reluctantly accepted the conversation took place pre-Covid, i.e. before March 2020.
37. In the course of these proceedings, the Claimant was trying to suggest that his wife who is an experienced HR Representative could not assist him with letters he wrote to the Respondent as she was helping the daughter in hospital for 10 weeks. However, that was plainly untrue as it transpired the daughter went into hospital his resignation.
38. The Claimant clearly lied about his behaviour on 30 March 2021, the Claimant saying he swore on only two occasions. Whereas a Witness Statement taken for the purposes of the Investigation a few hours after the incident, Mr Gray details the Claimant repeatedly swearing (page 191). As does Mr Richardson who recounts his version of events two hours after the incident in which he recalls the Claimant repeatedly swearing at him and Ms Down (page 185). Ms Down recalls the Claimant repeatedly swearing. The Claimant's evidence was clearly self serving and finds the truth an alien concept.

The Law

UNFAIR DISMISSAL

39. An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.
40. It is well established Law that there is implied in a contract of employment, a term that the employer's will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole to determine whether it is such that its cumulative effect, judged

reasonably and sensibly is such that the employer cannot be expected to put up with it.

41. The test is really whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice.

AUTOMATIC UNFAIR DISMISSAL – s.100 of the Employment Rights Act 1996

42. Section 100 of the Employment Rights Act 1996 (“ERA”) (Health and Safety cases) provides,

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that-

(a) ...

(b) ...

(c) being an employee at a place where-

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employer to raise the matter by those means,

he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) ...

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

43. In order for s.100(1)(c) ERA 1996 to come into play it is first necessary to show that:

- a. it was not reasonably practical for the employee to raise the health and safety matters through the Safety Representative or Safety Committee;
- b. that the employee must have brought to the employer’s attention by reasonable means the circumstances that he reasonably believed are harmful or potentially harmful to Health and Safety; and
- c. that the reason for the dismissal, or at least the principal reason if there is more than one, must be the fact that the employer was exercising his right.

44. S.100(1)(e) should be applied in two stages,
- a. Firstly, the Tribunal should consider whether the criteria set out in that provision has been met, as a matter of fact.
 - a. Were there circumstances of danger which the employer reasonably believed to be serious and imminent?
 - b. Did he take, or propose to take, appropriate steps to protect himself or other persons from the danger?
 - c. Did he take appropriate steps to communicate those circumstances to his employer by appropriate means?
45. If these criteria are not satisfied, s.100(1)(e) is not engaged. If the criteria is made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was the employer took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair. The mere fact that an employer disagreed with the employee as to whether there were (for example) circumstances of danger or whether the steps were appropriate is irrelevant. The employee's belief that there is a serious and imminent danger must be objective, reasonable and not fanciful, but so long as that is the case the employer will be protected regardless of an employer's assessment of the level of risk.

CONCLUSIONS

AUTOMATIC UNFAIR DISMISSAL (the detriments relied upon)

46. It is clear the reason why the Claimant was sent to the Manager's Office on 30 March 2021 was the Claimant's failure to follow a reasonable management instruction as to where he was to work on that day.
47. As to what occurred in the Manager's Office, it is not unreasonable for a Manager, particularly Ms Bulton-Dowd the Continuous Improvement Officer, to state firmly or robustly that an employee will work where he is told to work provided that instruction is reasonable; it clearly was. Furthermore, it was not unreasonable for Ms Bulton-Dowd to make it clear if the Claimant left site on 30 March 2021 that would be treated as an unexplained absence and clearly disciplinary action would be commenced. It was therefore not unreasonable for Ms Parker of HR on 31 March 2021 to write to the Claimant explaining that his current absence was classed as unexcused. Furthermore, it was again not unreasonable for Ms Parker to further email the Claimant on 1 April 2021 to reiterate that the Claimant's continued absence from work remained unexcused until he makes contact with the Respondents.
48. As to Ms Parker wanting time to consider the Claimant's email of 5 April 2021 regarding his concerns about health, it was not unreasonable for her to take time to respond in order to make enquiries about those matters the Claimant was complaining about.

49. Clearly there were delays in responding to the Claimant's email, although that was not helped when originally the Claimant was corresponding directly with Ms Parker's email address and subsequently, for reasons best known to the Claimant, decided to email using the Respondent's generic HR box which would inevitably have caused a delay. There was then an internal change in the HR department. Clearly there was never any intention by the Respondent not to address the Claimant's issues or deal with his Grievance.
50. Therefore, the Claimant's claims that he suffered detriments for raising Health and Safety matters is simply not well founded.

AUTOMATIC UNFAIR DISMISSAL – s.100 ERA 1996

51. The suggestion that the Claimant was forced to resign because he brought to the Respondent's attention circumstances connected to his work which he reasonably thought were harmful, or potentially harmful, is simply not made out on the facts. Clearly the principal reason for the Claimant's resignation had nothing to do with Health and Safety matters and it is difficult to understand why the Claimant resigned.
52. As to the second claim, were the circumstances of danger which the employee reasonably believed to be serious and imminent? Again on the facts, given the extent to which the Respondent took seriously the precautions put in place for Covid-19, is simply not made out. It was clearly not appropriate to remove himself from the premises in circumstances where he was being asked to work in another area which had the appropriate safety measures. Clearly the manner in which the Claimant then tried to communicate his concerns was wholly inappropriate. By that I mean becoming abusive and aggressive towards Managers.

CONSTRUCTIVE UNFAIR DISMISSAL

53. Clearly, on the facts of this case the way the Claimant behaved on 30 March 2021, was not conduct which can be seen to be put at the foot of the Respondent's door, so to speak. The Claimant was unhappy about being asked to move to another department, he refused to follow a reasonable management instruction and went to a Senior Manager's Office clearly to remonstrate about the situation. He then left the Respondent's premises in a fit of temper, failed immediately to communicate with the Respondent and quite reasonably HR trying to get to the bottom of his absence. There was some delay in investigating and dealing with the situation and the Claimant's Grievance, but not to such an extent that one gets anywhere near saying that the Respondents were guilty of conduct that was sufficiently serious to be described as an employer no longer being bound by the implied term of trust and confidence.

54. Clearly the Claimant has been disingenuous and the Tribunal rather suspected he engineered the whole situation as he wanted to concentrate on his fencing business and his family, which of course is his right to do so.
55. The Claimant's claim, therefore, that he was constructively unfairly dismissed is simply not made out.

Employment Judge Postle

Date: 18/4/2023

Sent to the parties on: 20/4/2023

NG

For the Tribunal Office.