



EMPLOYMENT TRIBUNALS

Claimant: Mr K Williams
Respondent: Breasley (UK) Limited
Heard at: Nottingham (via CVP)
On: 1 October 2021
Before: Employment Judge Smith (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr A Carter of Counsel

JUDGMENT

1. The Claimant's claim of wrongful dismissal succeeds.
2. The Respondent is ordered to pay to the Claimant damages for breach of contract assessed in the sum of £2,387.80.
3. The Respondent's employer's contract claim is dismissed, having been withdrawn.

REASONS

Request for written reasons

1. An oral judgment, together with reasons, was delivered at the conclusion of the full hearing which took place on 1 October 2021. Written reasons for the Tribunal's judgment were requested by Mr Carter, Counsel for the Respondent.

These fuller written reasons have been promulgated pursuant to that request and the parties' right to written reasons as stipulated by r.62(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, sch.1.

Introduction

2. By way of an ET1 claim form received by the Tribunal on 6 July 2021 the Claimant presented a claim for notice pay against the Respondent. By way of an ET3 response form dated 5 August 2021 the Respondent defended the claim in its entirety, and it also presented an employer's contract claim against the Claimant. That employer's contract claim was for damages arising from the cost of replacing company property the Claimant had allegedly failed to return.
3. At the outset of the hearing the Respondent withdrew its employer's contract claim and I dismissed it upon its withdrawal. I was informed that the property which had been the subject of that claim had been returned by the Claimant.
4. The sole remaining claim was therefore the Claimant's claim for notice pay, usually described as a wrongful dismissal claim. This claim was presented on the basis that the Claimant had been constructively wrongfully dismissed, rather than on the basis of an express termination by the Respondent.

The issues

5. Following a discussion with the parties at the outset it was agreed that the main points of dispute I had to determine were, firstly, whether the Claimant was constructively dismissed, and secondly, if he was, whether he was wrongfully dismissed. The specific issues I had to determine were agreed as follows:

(1) Was the Claimant dismissed? Specifically:

- (a) Did the Respondent breach the Claimant's contract of employment? The contractual term relied upon by the Claimant was the implied term of mutual trust and confidence.
- (b) If so, was that breach fundamental?
- (c) If so, did the Claimant resign in response to that breach or for some other reason?
- (d) If so, did the Claimant nevertheless affirm or waive the breach through his words or his conduct?

(2) If the Claimant was dismissed:

- (a) Was he entitled to be given notice by the Respondent?
- (b) If so, was he given notice?

- (c) If not, was the Respondent entitled to dismiss him without notice as a consequence of the Claimant's own fundamental breach of contract? The contractual term relied upon by the Respondent was also the implied term of mutual trust and confidence.
- (d) If the Respondent was not entitled to dismiss the Claimant without notice, to what award of damages is the Claimant entitled?

The hearing

- 6. I was presented with a bundle of documents amounting to some 173 pages. Both parties directed me to the documents they considered relevant during the course of the hearing. In addition, I also heard live evidence from the Claimant on his own behalf and from Mr Mohammed Saud Khan (known as Pomi Khan), Chief Executive Officer, on behalf of the Respondent.

The law

Constructive dismissal

- 7. At common law, an employee who terminates the contract of employment may nevertheless claim to have been dismissed by the employer if the circumstances are such that he is entitled to terminate it by reason of the employer's conduct. This concept is known as a constructive dismissal. The entitlement to terminate must be a contractual entitlement. The leading case on whether there has been a constructive dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** (Court of Appeal), and there are four tests to be satisfied in this regard. Those are:
 - (1) Did the employer breach the employee's contract of employment?
 - (2) If so, was that breach fundamental?
 - (3) If so, did the employee resign in response to that breach or for some other reason?
 - (4) If so, did the employee nevertheless affirm or waive the breach through his words or his conduct?
- 8. In this case the Claimant contends that he was wrongfully constructively dismissed because he resigned in response to a breach of the implied term of mutual trust and confidence. The definition of that term was set out by the House of Lords in the case of **Malik & another v BCCI [1997] IRLR 462**, which I shared with the parties before the commencement of the evidence. It is an implied term of the contract of employment that "*the employer shall not, without reasonable and proper cause, conduct itself in a way which is calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence with the employee*". A breach of this term is always fundamental, automatically satisfying the first and second of the **Western Excavating** tests: **Morrow v Safeway Stores plc [2002] IRLR 9** (Employment Appeal Tribunal).

Wrongful dismissal

9. Wrongful dismissal is a common-law contractual claim, normally pursued in respect of notice pay. The Employment Tribunal has jurisdiction to consider complaints of wrongful dismissal by virtue of arts.3 and 4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 arising or outstanding on the termination of employment.
10. If the claim is for notice pay it must first be proven that the employee had a contractual entitlement to notice of the termination of their employment. The second stage concerns the dismissal itself: if the employee is dismissed without notice, a breach of contract is in principle established. At the third stage it is for the employer to prove that it was entitled to dismiss the employee without notice. Such an entitlement is created if the employee had acted in fundamental breach of the contract of employment. This is typically (though not always) said to have occurred if the employee has committed an act of gross misconduct, or engaged in conduct which would objectively be viewed as being so serious so as to repudiate the contract (Hutton v Ras Steam Shipping Co Ltd [1907] 1 KB 834, Court of Appeal).
11. In this case the Respondent also relies on the implied term of mutual trust and confidence (the Malik term, cited above) as entitling it to dismiss the Claimant without notice. If the employer establishes that it was entitled to dismiss without notice, the wrongful dismissal claim fails. If the employer fails to do so, the claim succeeds.
12. The assessment of damages for wrongful dismissal is to be done by awarding as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal (Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503, House of Lords). Typically, the amount of damages is assessed as reflecting the period of notice to which the employee was entitled to receive. In this case, notice pay is all that is claimed.
13. As a contractual claim, the employee is under a duty to mitigate his loss and if the employer proves that he has unreasonably failed to do so (Fyfe v Scientific Furnishings Ltd [1989] IRLR 331, EAT) certain amounts must also be deducted from the sum of damages (Chaplin v Hicks [1911] 2 KB 786, Court of Appeal). Any award of damages should also reflect the fact that as a claim for lost pay during the notice period, such sums would be subject to taxation.

Findings and conclusions

14. In the paragraphs that follow I have set out my findings of fact in relation to each of the agreed issues, and my conclusions in relation to them having applied the law. Where necessary, I have referred to the parties' respective submissions if there was a dispute between them.

(1)(a) *Did the Respondent breach the Claimant's contract of employment?*

15. My determination of this issue focuses on what happened on 17 May 2021, and my findings of fact are as follows. At 9.44am that morning the Claimant was invited to a meeting by Mr Khan, the Respondent's Chief Executive Officer, via email. He was not informed what the meeting was to be about. Mr Khan merely said, *"Please let me know when you are in as I would like to sit down with you for a little bit to go over a few things."*
16. The Claimant arrived and at the meeting, which lasted no longer than ten minutes, he was told that Mr Khan had received complaints about his conduct, namely complaints that the Claimant had been aggressive and had made racial and sexual comments to staff. Mr Khan stated that these comments included an allegation that the Claimant had said that his hands were blacker than those of a colleague.
17. Mr Khan then informed the Claimant that he would be moved to a different office, on a different floor, and that contact with the members of staff who reported to him would now have to go through a third party, Mr Ritchie. It was agreed by both witnesses that at this point the Claimant became angry and said to Mr Khan, *"you are taking my staff away from me"*. Mr Khan said that this set of measures was merely a suggestion, rather than an instruction.
18. I did not accept Mr Khan's evidence that this was a mere suggestion. It had not been phrased as a suggestion but as an instruction, and in his witness statement Mr Khan did not say that it was offered as a mere suggestion. At paragraph 10 of his witness statement Mr Khan dealt with the Claimant's specific comment and his response – that *"staff movements always happen in an organisation"* – confirmed to me that this was being conveyed as something that was going to happen and not merely being suggested. Mr Khan's oral evidence was a significant departure from his witness statement.
19. In addition, Mr Khan suggested that the set of measures was expressed to the Claimant to be a temporary arrangement. This contention was not made anywhere in Mr Khan's witness statement or in his earlier, internal statement which appeared in the bundle at page 132. In this second respect Mr Khan's oral evidence amounted to a significant departure, this time from two prior written accounts. For these reasons, I did not accept Mr Khan's evidence on this point either. The situation being presented to the Claimant was that he was being told that serious allegations had been made as to his conduct and at the same time being told he had to move offices and lose direct contact with his subordinates. It was not surprising to me that the Claimant was angry about this.
20. In answer to my inquiry Mr Khan in fact accepted that he had not, in this meeting, mentioned to the Claimant that these arrangements were temporary whilst the Respondent investigated the complaints against him, but he said in evidence that he was going to come to that subject had the Claimant not stormed out. On the balance of probabilities I found that this was not the case. If that had been Mr Khan's intention, it would likely have been made clear to the Claimant either at the outset of the meeting or at some point within the ten minutes of the meeting,

given the gravity and immediacy of the consequences of the measures for the Claimant's working arrangements.

21. I was confirmed in my view because of the Respondent's later letter of 20 May 2021 (page 137), authored by its co-Managing Director Mr Badman, which stated that the purpose of separating the Claimant from his subordinates was "*until such time as you were able to conduct yourself appropriate (sic) in the workplace*" rather than for temporary, investigatory purposes. In my judgment, the Respondent's approach indicated that it had reached a conclusion as to the Claimant's guilt.
22. I found that the Claimant was so angered by what Mr Khan had told him that he did not just get out of his chair (as he contended in evidence) but it was likely that he pushed it back in anger and said, as Mr Khan alleged, "*I'm done here: you will have to find another accountant*". At this point, the Claimant stormed out of the meeting. He submitted that what had happened on 17 May amounted to a fundamental breach of contract, specifically of the implied term.
23. In his submissions Mr Carter contended that it was not. He submitted that the Respondent had a general right to dictate the manner in which the Claimant was required to work, relying on **Dryden v Greater Glasgow Health Board [1992] IRLR 469** (EAT). Mr Carter also relied upon the case of **Braganza v BP Shipping Ltd [2015] UKSC 17** (Supreme Court) in support of a submission that the exercise of the Respondent's discretion has to not merely be unreasonable but reach the higher standard of **Wednesbury** unreasonableness before it can be said to be a breach of the implied term of mutual trust and confidence (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223**, Court of Appeal). The essence of **Wednesbury** unreasonableness, or irrationality, is that no reasonable person acting reasonably would have made such a decision.
24. In my judgment, the **Dryden** and **Braganza** cases are not apt to cover a situation like the one faced by the Claimant on 17 May 2021. **Dryden** concerned works rules (a no-smoking policy) introduced by the employer; it is at least distinguishable on the facts. **Braganza** concerned an employer's decision made under an express discretion afforded to it under the contract to determine eligibility for death-in-service benefits. Those facts also distinguished it from this case, but in addition, after **Braganza** the Court of Appeal recognised (in **IBM United Kingdom Holdings Ltd v Dalgleish [2018] IRLR 4**, at paragraph 41) that there is a proper distinction to be drawn between cases involving the exercise of contractual discretionary powers (such as **Braganza** and **Dalgleish** itself, a pensions case) and those involving objectionable behaviour on the part of the employer. In the latter category, the threshold is not that of **Wednesbury** unreasonableness. In my judgment, the present case is one of objectionable behaviour which properly comes within the latter category and not the former. Although it was a carefully constructed submission, it was for these reasons that I rejected it.
25. Mr Carter was of course correct to submit that the Respondent had a responsibility to take steps to resolve the complaints made against the Claimant.

Had it given the Claimant some indication of the nature of the 17 May meeting before it occurred, and had Mr Khan made it clear to the Claimant in the meeting that the measures were temporary whilst the matter was investigated, it would have had reasonable and proper cause to do those things in the context of the complaint made against the Claimant. However, on the basis of the findings I have made, that is not what happened. In my judgment Mr Khan did not have reasonable and proper cause to do what he did on 17 May 2021, and whilst it was not calculated to, his behaviour was likely to seriously damage the relationship of mutual trust and confidence between the Claimant and his employer.

26. It therefore follows that the Respondent acted not merely unreasonably but much more seriously, and in breach the term of mutual trust and confidence implied into the Claimant's contract of employment (the **Malik** term). Other breaches of contract were contended for by the Claimant but given my findings and determination in relation to the principal breach – the events of 17 May 2021 – it was not necessary for me to go on to make findings in relation to any other alleged breaches.

(1)(b) If so, was that breach fundamental?

27. Any breach of the implied term of mutual trust and confidence is fundamental: **Morrow v Safeway Stores**. This case is no different. It follows from my determination of issue (1)(a) that the Claimant has established that the Respondent fundamentally breached his contract of employment, the second strand of **Western Excavating**.

(1)(c) If so, did the Claimant resign in response to that breach or for some other reason?

28. The Claimant resigned without notice by way of an email sent to Messrs Khan and Badman at 15:13 on 19 May 2021, two days after the meeting of 17 May. That email forwarded an email he had sent to both gentlemen on 18 May, in which he made reference to the events of 17 May.

29. On behalf of the Respondent Mr Carter sensibly conceded that the Claimant had indeed resigned because of what had happened at the meeting of 17 May. It therefore follows that the Claimant has satisfied the third strand of **Western Excavating**.

(1)(d) If so, did the employee nevertheless affirm or waive the breach through his words or his conduct?

30. Again sensibly, on behalf of the Respondent Mr Carter conceded that the Claimant had not affirmed or waived the breach of contract. It follows that there has been no waiver or affirmation and that the Claimant has satisfied the fourth and final strand of **Western Excavating**.

31. It further follows that, in my judgment, the Respondent constructively dismissed the Claimant.

32. I now turn to the issues in relation to the wrongful dismissal claim.

(2)(a) If the Claimant was dismissed, was he entitled to be given notice by the Respondent?

33. The agreed position between the parties was that the Claimant's contract of employment entitled him to four weeks' notice. That was evident from clause 16 of the Claimant's statement of employment particulars (pages 36 to 42), which entitled him to such a period in the event his length of service was between one month and one year. The parties agreed that the Claimant commenced his employment on 27 October 2020 and he was constructively dismissed on 19 May 2021, putting him well within that contractually stipulated period.

(2)(b) If so, was he given notice?

34. It was agreed that the Claimant was not given notice of termination by the Respondent.

(c) If not, was the Respondent entitled to dismiss him without notice as a consequence of the Claimant's own fundamental breach of contract?

35. The fundamental breach of contract relied upon by the Respondent as entitling it to dismiss the Claimant without notice is the racial comment said to have been made by him to his colleague, namely that his hands were blacker than hers. It was contended that that was a breach of the implied term of mutual trust and confidence as per **Malik**, and thus fundamental as per **Morrow**.

36. It is admitted by the Claimant that the remark was made.

37. I agreed with Mr Carter's submission that on its face, a racial remark is something that is capable of amounting to gross misconduct or – in the context of a wrongful dismissal claim – a fundamental breach of contract. However, context is highly significant. For example, and by way of analogy, harassment relating to race under **s.26 Equality Act 2010** would not be made out if a comment was made but it was not unwanted by the recipient. Nor would such a comment amount to **s.26** harassment if it did not have the effect of violating the recipient's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. Understanding the context in which a comment was made is often crucial in determining its likely impact.

38. I did not hear evidence from the Claimant's colleague as the Respondent elected not to call her to give evidence, so I was left in the position of having to determine whether the Claimant's admitted conduct did amount to a fundamental breach of contract on the basis of the evidence provided to me.

39. In my judgment, the Claimant's comment was one which was likely to cause offence. It was included within a written complaint about this and other matters from his colleague (page 129). On the other hand, I did hear live evidence from the Claimant about the kinds of conversations that particular colleague had had with him, namely that she herself had talked to him using such terms. It was clear

to me that the context in which the Claimant made his remark would be of particular importance in determining whether it amounted to a fundamental breach of contract.

40. Unfortunately, in the absence of live evidence from the Claimant's colleague I was not in a position to make a finding that the Claimant's use of a racial remark did on this occasion amount to a fundamental breach of contract on his part. Accordingly, the Respondent has therefore not discharged the burden of proof placed upon it. For this reason, the Respondent was not entitled to dismiss the Claimant summarily.

41. It follows that the Claimant was wrongfully dismissed.

(2)(d) If the Respondent was not entitled to dismiss the Claimant without notice, to what award of damages is the Claimant entitled?

42. The Respondent agreed that in the event his claim succeeded, the sum due to the Claimant in damages represented 4 weeks' pay, subject to mitigation. Other than in relation to the principle of whether the damages should be assessed net or gross, the parties were apparently in agreement that I should either order the Claimant's figure (£3,500) or the Respondent's figure (£2,387.80). The law is clear that I may only assess damages for wrongful dismissal on a net basis, taking account of taxation. In those circumstances, I order the Respondent to pay damages to the Claimant assessed in the sum of £2,387.80.

43. Mr Carter submitted that I should reduce this amount because of what he contended was an unreasonable failure on the part of the Claimant to mitigate his loss. The step he contended the Claimant ought to have taken was to raise a grievance with the Respondent, and it was an agreed fact that he did not do so. In my judgment, this did not amount to unreasonable conduct on the Claimant's part because the Respondent had fundamentally breached the Claimant's contract of employment, entitling him to treat himself as being dismissed as at 17 May 2021 and with the result that the Claimant terminated the contract two days later. Even if the Claimant had raised a grievance, that would not have resulted in him earning any money to replace what he had lost in pay as a result of the Respondent's repudiation of the contract. In my judgment, Mr Carter's submission had no reasonable prospect of success and I had no hesitation in rejecting it for these reasons.

Employment Judge Smith

Date: 15 October 2021

