EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Kersley

Respondent: Airvending Limited

Heard at: Reading **On: 18 February 2022**

Before: Employment Judge Gumbiti-Zimuto
Members: Mr Colin Davie and Mrs Catherine Smith

Appearances
For the Claimant: Mr Nigel Warren-Green
For the Respondent: Mr Daniel Brown, counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. The respondent is a supplier of self-service forecourt vending machines. Its customers include hypermarkets, oil companies and forecourt operators. The respondent employs 130 staff of which 67 are field based.

2. The claimant was employed by the respondent as a service engineer/Logistics/cash operator from 11 April 2014 under a contract of employment dated 6 May 2015. The claimant subsequently signed a new contract on 5 July 2019.

3. The meaning of the claimant's contract of employment became a matter of dispute between the claimant and the respondent in 2018. The respondent contended that it was a term of that contract that the claimant would work 45 hours a week including weekend working in accordance with a rota that would usually involve working one weekend in four. The claimant contended that the contract provided that any weekend work in excess of the contracted 45 hour week, should either be paid for by the respondent as overtime, or else time off should be given in lieu of any extra hours worked.

4. In April 2018 John McCreedy was appointed to a new role as the respondent's security manager and became the claimant's line manager.

5. Mr McCreedy formed the view that the claimant's performance was substantially below that of his colleagues. The claimant takes issue with that pointing to the fact that he was awarded pay increases in 2018 and 2019 in addition to being commended for his contribution to the success of the respondent's organisation.

6. The claimant did not work weekends in accordance with the rota. The claimant did not consider that it was a contractual requirement that he do so. Mr McCreedy considered that the claimant was required to work weekends under the contract of employment.

7. In further discussion with him, it was evident that he had his own interpretation of what his contract involved stating that he was not required to work weekends in spite of there being no evidence to support this assertion.

8. The claimant and Mr McCreedy discussed the claimant's working pattern and practises. The claimant contends that Mr McCreedy "continued informally to pressure and challenge" him over his contract and performance. Eventually matters came to a head when Mr McCreedy informed the claimant that he would not authorise any further overtime claims until the matter had been resolved.

9. On 23 May 2019 a meeting took place between the claimant, Mr McCreedy and Mr Lawrence. Mr Lawrence is project manager and the Mr McCreedy's line manager. Following this meeting a revised contract of employment was presented to the claimant. The first two iterations of that revised contract were not agreed by the claimant because they resulted in an effective pay reduction for the claimant, however, the claimant did sign the amended contract on the 5 July 2019.

10. The revised contract provided that the claimant's normal hours of work would be 49.5 hours per week Monday to Friday, with any hours above 49.5 hours a week being treated as overtime. Weekend working would be treated as overtime. The claimant's salary increased from £20,500 to £22,500 per year.

11. The claimant's performance was monitored by Mr McCreedy. The claimant's performance levels were challenged by Mr McCreedy and eventually a performance review meeting took place on 11 September 2019. At the meeting the claimant was presented with a report including evidence of alleged poor route planning, excessive time on sites, and unexplained visits.

12. The claimant makes a number of complaints about the 11 September review meeting. The claimant was not allowed to invite a third party

attending for support.

13. The meeting lasted about 2 hours, during which six questions were put to the claimant. Mr McCreedy made notes of the meeting and subsequently produced a report. The claimant says that the report does not properly reflect what was discussed. The claimant did not challenge the report at that time. In his witness statement the claimant sets out in detail what he says was said in this meeting.

14. The claimant's performance was monitored in the period for 6 to 29 November 2019. It was proposed that further a review would take place in December. A report of the claimant's performance was created but was not shown to the claimant at the time. The report was subsequently seen by the claimant following disclosure in the Tribunal proceedings.

15. On 10 December 2019 (p102) the claimant was sent an email from Mr McCreedy in which the claimant is criticised over his work performance. The claimant takes issue with the contents of this email and in his statement provides a detailed rebuttal of the email. The claimant considers that the email is "*a further indication of the persistence with which Mr McCreedy appeared determined to undermine [him] at every opportunity*."

16. The claimant states that the respondent's criticism of his performance is unjustified because the respondent set targets which were "*at the very least tight if not downright unrealistic*" and the suggestion of the claimant's alleged *"lack of planning' and avarice in tracking down 'high value machines' to the detriment of others"* is offensive and can be refuted by examination of the claimant's worksheets. The claimant also points out that there were administrative errors which were being adversely applied to the claimant's alleged poor performance record.

17. The disclosure process in these Tribunal proceedings produced a draft letter apparently prepared in December 2019, purporting to summon the claimant to a further performance review meeting. The letter was never sent to the claimant.

18. The claimant was signed off work due to stress from 12 December 2019.

19. On 1 January 2020 the claimant resigned. The claimant's resignation email stated, "*it's with my deepest regret that I am sending you this email to confirm I wish for personal reasons to resign at the end of January."*

20. The claimant worked out his notice period until 29 January 2020.

21. On the basis of these facts, the claimant says that he was constructively dismissed and the respondent denies that there was any breach of an express or implied term of the claimant's contract which caused his resignation.

Law

22. Section 95 (1) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct.

23. In Western Excavating (ECC) v Sharp [1978] 1QB 761 it was stated that: *"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 the employer's conduct. He is constructively dismissed. The employee is entitled in those 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 the 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."*

24. In Waltham Forest v Omilaju [2004] EWCA Civ 1493 it was stated that:

> "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) Ltd v Sharp [1978] 1 QB 761.
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> 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… "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, 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* (emphasis added).
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> 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" (emphasis added).
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> 5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:
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> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."…"

The parties' submissions

25. In his submissions on behalf of the claimant Mr Warren-Green stated that corporate pressure and bullying can take many subtle forms and rarely expresses itself in writing or in emails. What was going on behind the scenes was the result of the company having decided on an overhaul of its working practises and that instead of approaching this is in a professional and open manner they pursued a programme of exploratory meetings, discussions, and consistent challenges to the claimant's work practises. Were it not for the sudden appearance of Mr McCreedy on the scene and the company's decision to radically overhaul its working practises, and go about it in the way they did, the claimant would be happily working for the respondent according to his historic work practises which to all intents and purposes and all the evidence suggests was entirely to the respondent's satisfaction up until 2019, and within less than a year all the unravelling took place. After five years perfectly happy cooperative existence between the claimant and the respondent in the period from May 2018 until December 2019 the whole thing unravelled.

26. In essence the respondent submitted that there was no evidence to support the suggestion that there was any breach of contract by the respondent. The respondent had acted reasonably in dealing with the issues arising from the claimant's performance and the difference between the claimant and the respondent in respect of the interpretation of the claimant's contract of employment.

Conclusions

27. Did the respondent employer's actions or conduct amount to a repudiatory breach of the claimant's contract of employment?

28. The claimant relies on the respondent's conduct from about May 2018 until December 2019.

29. The claimant was asked to attend a meeting with his then line manager in May 2018 at which the claimant's working practises were to be discussed. The claimant accepts that the respondent was entitled to raise matters of concern about his performance in a reasonable and proper manner. The claimant's evidence does not allege that there was anything unreasonable in the way that this meeting was conducted.

30. With the appointment of Mr McCreedy an issue arose as to the claimant's entitlement to overtime pay for working weekends.

31. The claimant complains that the respondent withheld his pay. This is not established. What happened was that Mr McCreedy and the claimant disagreed about whether the claimant was entitled to be paid overtime in respect of weekend working. Mr McCreedy set out his position in an email to the claimant on the 27 April 2019 (p73). The email makes clear that the claimant is not to incur any further overtime "*until this matter has been resolved*" and gave an instruction for the claimant to be paid for his overtime. The claimant's payslips show that the payment was made to the claimant when due and that despite what was said the claimant's pay was not deducted.

32. At the meeting on 23 May 2019 the claimant discussed his contract as a result an offer was made of a new contract which after the first two iterations the claimant agreed to sign. In the manner in which these discussions were conducted and in reaching the new agreement there was no breach of contract by the respondent.

33. The meeting to review the claimant's work that took place on 11 September 2019 was conducted in a reasonable manner. The claimant takes issue with the way that the responses he gave in answer to the questions raised in the meeting were recorded. At the time there was no demur to the notes made. The notes are not intended to be a verbatim record of the meeting but merely a note. The failure to produce a full and detailed report of the discussion was not a breach of contract. The note of the meeting was not used in any way to the prejudice of the claimant.

34. The claimant complains about the fact that at the meetings in May and September 2019 he was not permitted to bring a colleague or be accompanied. There is no contractual or statutory entitlement requiring the respondent to permit the claimant to be allowed to attend these meetings with some support, they were not disciplinary or grievance meetings.

35. Mr McCreedy continued to monitor the claimant's performance. This is not breach of contract. Mr McCreedy noted the claimant's performance in a way that the claimant objects to. This too is not a breach of contract. There was an intention to invite the claimant to a formal disciplinary meeting because the claimant's performance, in Mr McCreedy's view was not satisfactory. This too was not a breach of contract.

36. The claimant was aware that he was being monitored and does not suggest any unreasonable behaviour or blatantly inappropriate conduct by Mr McCreedy. The claimant's position is that Mr McCreedy was making unfair comparisons of the claimant's performance with other colleagues, the claimant says that Mr McCreedy failed to take into account relevant factors which had he done so would have shown that the claimant was not performaning below the required standard. The mere fact of monitoring and recording the claimant's alleged performance is not a breach of contract but would be a necessary prerequisite to taking any action against the claimant in respect of his alleged poor performance.

37. The claimant was of the view that Mr McCreedy was treating him unfairly and unreasonably because the claimant was operating in accordance within what he genuinely believed to be the required parameters to comply with his contract of employment. He was working as he had always done and which had always previously been acceptable to the respondent. Although the facility existed for the claimant to raise a grievance about his treatment by Mr McCreedy the claimant did not do so.

38. Although Mr McCreedy intended to invite the claimant to a disciplinary meeting and had drafted a letter in anticipation of such a meeting the letter was never sent and the claimant was never invited to a disciplinary meeting.

39. The claimant is an honourable and honest man. Some of the respondent's criticism of the claimant may have implied that he was at times lying about matters which possibly caused him great upset. We do not consider that any such criticism of the claimant, if such was intended, can be properly justified. It was undoubtedly the case that the claimant at all times argued his corner with Mr McCreedy based on his understanding of the meaning and effect of his contract of employment. The claimant was relying on his own past practices and the fact that his previous manager found that his work to be satisfactory in all respects and consistent with the performance of the other service engineer/logistics/cash collectors, who were also working for the respondent at that time and had no reason to complain about his performance or attitude to the work or to the tasks he was reasonably required to perform by the respondent.

40. As of the 1 January 2020, when the claimant resigned his employment, the respondent had not been in breach of contract. The fact that the claimant and the respondent had different views of the claimant's contractual obligations and performance does not mean that there was a breach of contract. The claimant's resignation was not a constructive dismissal.

41. The claimant's claims are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 24 February 2022

Sent to the parties on:

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For the Tribunals Office

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