



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M A Hickling

**Respondents:** Paling Interiors and Others

**Heard at:** Nottingham

**On:** Monday 10 and Tuesday 11 July 2017  
and Wednesday 16 August 2017

**Before:** Employment Judge Blackwell (Sitting Alone)

## Representation

**Claimant:** Ms J Harrison, Solicitor

**Respondent:** Ms I Hamblin, Solicitor

# RESERVED JUDGMENT

The Tribunal's decision is:-

1. The claim of constructive unfair dismissal pursuant to Section 95(1)(c) of the Employment Rights Act 1996 fails and is dismissed.
2. The claim of a failure to provide written employment particulars succeeds but no monetary award can be made given the provisions of Section 38 of the Employment Act 2002.

# RESERVED REASONS

1. Ms Harrison represented the Claimant and called him to give evidence. Ms Hamblin represented the Respondent's and she called Mr Stephen Paling, Mr Stirland Paling, Mr C Jefferson, Mr L Pinfold and Mrs J R Lockton who is the sister of the two Paling brothers. There was an agreed bundle of documents, references are to page numbers in that bundle. We were unable to complete the case within the allotted time so I ordered written submissions which both sides have provided and both sides have commented on each other's submissions.

## Issues and the law

2. There was a preliminary point, namely as to the correct Respondent it is common ground that the correct Respondent is Paling Interiors which is a partnership, the two partners being the Paling brothers Stephen and Stirland.

3. Mr Hickling brings two claims, firstly that he was constructively unfairly dismissed and secondly that the Respondent failed to provide written particulars of the contract pursuant to Section 1 of the Employment Rights Act 1996. As to that failure the Respondents admit that they did not provide such particulars.

4. Turning to the substantive claim of constructive unfair dismissal the relevant statutory provision is Section 95(1)(c) of the 1996 Act:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)... , only if):-

(c) 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 employer’s conduct.”

5. As to case law the starting point is Lord Denning’s judgment in **Western Excavating v Sharp** [1978] ICR 221 as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or it shows 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.”

6. In this case Mr Hickling pleads that firstly there was a breach of the implied term of trust and confidence. He also pleads this as a “last straw”. In this case the last straw being the events of 16 December 2016. He alleges that the conduct of Stirland Paling was such that looking at all the circumstances objectively, that is from the prospective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refused to perform the contract.

7. Mr Hickling also alleged that the Respondents had breached health and safety regulations and requirements. This he later abandoned because in cross examination he stated that such matters had not been in his mind at the point at which he resigned.

8. In summary it is therefore for Mr Hickling to prove:-

- a) That there has been a significant breach in this case a breach of the implied term of trust and confidence.
- b) That he resigned as a consequence at least in part of that breach.
- c) That he did not affirm the contract.

### **Findings of fact**

1. Mr Hickling was first employed by the Respondent’s as a teenager in 1994.

2. The Respondent's are a small business predominantly engaged in upholstery but also to a small degree making furniture.
3. The Respondents' trained Mr Hickling and although there was no formal apprenticeship he has become a skilled and respected upholsterer. At the relevant time the two brothers both worked in the business with occasional assistance from their sister Mrs Flockton and they employed Mr Hickling, Mr Pinfold and Mr Jefferson.
4. Mr Hickling was as part of his duties, required to supervise and train Messrs Jefferson and Pinfold, who respectively joined the Respondent's in 2014 and 2016. Contrary to his assertions I find as a fact that Mr Hickling was given a pay rise as a consequence of taking on that supervisory responsibility.
5. Mr Hickling asserts that he was assaulted by Mr Stirland Paling in the early years of his employment. Mr Stirland Paling denies such assault.
6. Mr Hickling asserts that whilst it had never been pleasant to be employed by the Respondent's he had managed the situation until the deterioration which occurred in 2016 which he says was related to the illness and subsequent death of the brothers' mother who was the founder of the business. She was taken ill in March 2016 and died on 24 July 2016.
7. On 20 September 2016 Mr Hickling was late for work by reason of traffic delays and he sent a text to his partner recording that fact and saying that he got a serious dressing down because he got Craig (Jefferson) to make him a coffee. Mr Stirland Paling and Mr Stephen Paling both deny that such occurred and Mr Stirland Paling points to entries in his diary for that day which on his evidence indicate that he would not have been present to effect such a dressing down.
8. In turn the Respondent's case is that Mr Hickling's performance after his return from holiday in August 2016 deteriorated. They point to a number of events including one in June 2016; Mr Jackson's cushions and in December 2016 Mrs Ambler's patterns. They also allege that Mr Hickling was not carrying out his supervisory duties in respect of Messrs Jefferson and Pinfold.
9. On 11 October Mr Hickling sent another text to his partner at page 210 indicating that Stirland had lost the plot and that he was not intending to go out on the Friday night with the Palings and his work colleagues which up until then had been a regular event.
10. On 20 October Mr Hickling alleges that Mr Stirland Paling criticised him in front of Mr Pinfold. Both Mr Paling and Mr Pinfold deny that such event occurred.
11. On 26 October Mr Hickling alleges that he took two days off sick and that Mr Stirland Paling required him to make up those days. See another text at page 211. Mr Stirland Paling denies that he required Mr Hickling to make up those two days and further he cannot recall that Mr Hickling had time off in any event.
12. On page 212 on 31 October there is another text indicating that Mr Steve Paling felt that the Claimant was "not putting any grit in" ie not working hard enough. Also in that text to Mr Hickling records that he has told the Palings that he should not be micro managed and that they should allow him to manage Craig and Liam.

13. Also on page 212 is a further text on 9 November which states “I hate it here so much”. At page 213 on 23 November is another text from Mr Hickling saying that he is walking on egg shells and suggesting that family bitterness is the cause.

14. On 24 November there is another text indicating that Mr Hickling had had enough and then further in response to his partner saying “only thing stopping me is I can’t just walk because of the house and family”. At page 215 is yet another text:

“I am fucking done with this place, he’s an aggressive wanker and I’ve out of it.”

Later he states “I have had enough. So close to just walking today. I am not having it anymore, fuck it all”.

15. Mr Hickling did not go to the firm’s Christmas party because he alleges that he could not bear to be in the presence of Mr Stirland Paling.

16. On 15 December Mr Hickling received a telephone call from his step daughter because her boyfriend was refusing to leave the family home. Mr Hickling’s step daughter has mental problems and had at that time sought to commit suicide. These facts were known to the Palings. It is common ground that Mr Hickling understandably left in a great hurry and there is a conflict of evidence as to precisely what Mr Hickling said to Mr Stirland Paling on departure.

17. Mr Stirland Paling texted Mr Hickling and asked him to pick up some items which were needed for the business and Mr Hickling reluctantly obeyed even though the situation in regard to the boyfriend was not wholly resolved. The boyfriend had left the premises but was still hanging around the area.

18. The two main protagonists did not then meet again until late the following day. Mr Hickling cites another text sent to his partner at page 216 where he states:

“Just basically tore into me for yesterday. Called me a glorified babysitter. Wants more out of me. I am paid to manage the workshop and if I am not up to it say so and he will reduce my wage to fit.”

19. Mr Hickling alleges that in this confrontation Mr Paling was aggressive and bullying. That he criticised him for not managing Mr Pinfold properly: That he swore at him and threatened to reduce his wages because I was a manager but that I was not managing Craig or Liam.

20. It is further alleged that Mr Paling said that “he did not give a shit” about Mr Hickling’s home situation ie the problems of his step daughter.

21. Mr Paling accepts that he was annoyed and that was because on his return late on 16 December he found Mr Hickling working on a cushion that was not destined for a customer. It is common ground that it was a cushion for Mr Hickling’s own use.

Mr Paling accepts that his annoyance was as a result of yesterday's events ie Mr Hickling's departure from the office and his subsequent absence for several hours and then finding him working on his own cushion rather than working on the businesses work particularly given that the run up to Christmas was the busiest time. Mr Paling denies being aggressive but does accept that he used the phrase "I don't give a shit". He also accepts that Mr Hickling's supervisory role was discussed and that he told him that he was not satisfied with his performance and that he invited him to consider whether he was up for the job, that if he felt that he was not capable of managing then he should say so and that that would be reflected in a reduction of wages.

22. The next day Mr Hickling went off sick and resigned by e-mail at page 217 as follows:

"Due to the incident on Friday evening when Stirland had a go at me for nothing, I feel that there is no way I can return to work following the threats and aggression that were made towards me. I have had enough of being treated like this. With regret I hand my notice with effect of now 22 12 16. Please respect my wishes and contact me through e-mail only."

## Conclusions

23. Ms Harrison's very lengthy submissions can I think be distilled into two main elements. The first is that as a matter of law, foul language even on one occasion may found a claim of constructive and unfair dismissal. She cites a number of cases including **Cantor Fitzgerald International against Bird** [2002] IRLR 867 and **Moore v Bude-Stratton Town Council** [2000] IRLR 676. She also rightly points out that much turns on the credibility of the two main protagonists, namely Mr Hickling and Mr Stirland Paling. She cites in particular the sending of the texts to which I have referred to above as evidence supporting Mr Hickling's case.

24. The second is that there was a breach, of the implied term citing Stirland's behaviour from August 2016 and the last straw was his actions on 16 December.

25. I have to say that I did not find the Claimant a credible witness. There are a number of reasons for saying so but I would highlight:-

25.1 He pursued both in his claim form and his evidence in chief allegations that the Respondent's had not followed good health and safety practice in a number of instances. Firstly these allegations were in my judgment unfounded and secondly more importantly Mr Hickling conceded in cross examination that he did not have these alleged health and safety issues in his mind at the point that he resigned.

25.2 His allegations that he lacked support are in contradiction to his evidence that he was constantly micro managed.

25.3 The manner in which he sought to deal with the Respondent's allegation that he would have been dismissed for sending degrading, pornographic material to Liam Pinfold showed a complete lack of a moral compass. That is because whilst he admitted the facts (he had no alternative) he sought to put the blame on both Mr Pinfold and the Respondent's.

26. Equally I did not find Mr Stirland Paling to be an entirely reliable witness. However except insofar as the events of 15 and 16 December 2016 are concerned his evidence is largely confirmed by that of his brother and his two employees whom I found to be straightforward and credible witnesses. Saying that I recognise that Mr Stephen Paling is a partner and that Messrs Jefferson and Pinfold remain employees. Mr Stephen Paling's evidence was I consider given out of sorrow and regret for the breaking down of not only the employment relationship but also the personal relationship between him and Mr Hickling. The two employees' evidence was straightforward. They both denied that Mr Hickling had been undermined, criticised or sworn at though they did accept that there was swearing in the work place, though the swearing was not directed at individuals.

27. I cannot accept the picture painted by Mr Hickling which is perhaps best summed up by his statement at paragraph 5 of his proof of evidence:

"It had never been a particularly pleasant experience to work at the first Respondent. However I managed up until 2016."

It is simply not credible that a talented craftsman such as Mr Hickling would have tolerated the behaviour of which he complains for such a period of more than twenty years.

28. Mr Hickling then goes on to set out the deterioration of the relationship subsequent to the death of Mrs Paling. On the other hand the Respondents allege that post his return from holiday in August 2016 there was a deterioration in Mr Hickling's performance. Whilst I accept that both occurred, both allegations were exaggerated.

29. On balance whilst I accept that there was a deterioration in the relationship of employer/employee I do not believe that there is any credible evidence to support Mr Hickling's case up until the events of 16 December. I accept as a matter of law that a single occurrence of the use of foul and abusive language can amount to a breach of the implied term of trust and confidence. In my judgment the only foul language that was used was the phrase "I don't give a shit" and I accept that that was said in the context of Mr Hickling's home situation and in particular the mental state of his step daughter. Clearly that was an unacceptable statement to make.

30. I believe that Mr Paling was annoyed and he had reasonable cause to be annoyed. I believe that he took the opportunity to take Mr Hickling to task about the deterioration in his performance and again he had reasonable cause so to do. As to Mr Hickling's allegation that he threatened to demote him, I think the answer lies in Mr Hickling's own text at page 216:

"Wants more out of me. I am paid to manage the work shop. If I am not up to it say so and he will reduce my wage to fit."

31. Given those findings I am not satisfied that Mr Hickling has established that there has either been a lack of support or a breach of the implied term of trust and confidence. His claim of constructive unfair dismissal must therefore fail.

32. Although in the light of that decision I am not required to do so, I will make a finding on the Respondents assertion that shortly after his resignation he would in any event have been dismissed because during working hours he had sent degrading, pornographic material to Liam Pinfold who was at the time 17 years of age and under Mr Hickling's supervision. Those facts are common ground.

33. I have not taken into account either in my findings relating to the constructive unfair dismissal or this matter whether what Mr Hickling admitted to was a criminal offence. It is not relevant.

34. Mr Hickling's response was to state firstly that Mr Pinfold openly discussed his sex life at work and that after the sending of the first piece of material Mr Pinfold did not object and so further material was sent. Mr Hickling also alleged that there were a number of instances which he said condoned his behaviour. This ignores the fact, even accepting his evidence at face value which I do not, that the events he cites did not involve pornographic material, nor did they involve individuals below the age of 18.

35. Thus there is admitted misconduct which is a potentially fair reason for dismissal.

36. The next question is would the Respondents' have dismissed the Claimant and if so would such dismissal have been fair having regard to the statutory test of fairness set out in sub section 4 of Section 98 of the Employment Rights Act. I find as a fact that the Respondents on their evidence would have dismissed and that such dismissal would have been fair. This was plainly an act of gross misconduct.

**Failure to provide written particulars**

37. This is admitted by the Respondents but given that I have dismissed the substantive claim of constructive unfair dismissal I have no power to make an award having regard to the provisions of Section 38 of the Employment Act 2002.

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Employment Judge Blackwell

Date 31 August 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 September 2017

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FOR EMPLOYMENT TRIBUNALS