



EMPLOYMENT TRIBUNALS

Claimant: Mr Mohammed Khaliq

Respondent: DHL Services Limited

Heard at: Birmingham
2018

On: 02&04 July 2018, 09 &10 July

Before: Employment Judge Butler

Representation

Claimant: In person – Mr Price-Rowlands, Counsel on 09 July 2018

Respondent: Ms. Rezaie, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claims of constructive unfair dismissal and breach of contract are not well founded and are dismissed.

REASONS

1. Background

1.1 By a Claim Form presented on 14 August 2017, the Claimant brought complaints which at a Preliminary Hearing on 14 November 2017 were clarified as being for constructive unfair dismissal and breach of contract. The Respondent defended the claims.

2. The Preliminary Hearing

The Parties agreed that the issues were:

2.1. Was there a fundamental breach of the implied duty of mutual trust and confidence by the Respondent?

2.2. If so, did the Respondent's breach cause the Claimant to resign?

- 2.3. Did the Claimant wait too long before resigning, thus affirming the breach?
- 2.4. If the Claimant was constructively dismissed by the Respondent, what was the reason for the dismissal? The Respondent asserts that it was a reason related to capability which is a potentially fair reason for Section 98 (2) Employment Rights Act 1996.
- 2.5. If so, was the decision to dismiss a fair sanction, that is, was it within the range of responses for a reasonable employer?
- 2.6. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the conduct alleged?
- 2.7. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event and/or to what extent and when?
- 2.8. Has the Claimant complied with his duties to mitigate his loss?
- 2.9. What were the terms of the Claimant's contract of employment in respect of job title and remuneration?
- 2.10. Were either of those terms varied?
- 2.11. If so, how, when and by whom?
- 2.12. Did the Respondent breach a term of the Claimant's contract?
- 2.13. If so, how and when?
- 2.14. Did the Claimant suffer a loss as a result of any such breach?
- 2.15. If so, how much and over what period?

3. The Law

3.1. Section 95(1)(c) provides that 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".

3.2. In *Western Excavating (ECC) Limited -v- Sharp* 1978ICR221, CA, The Court of Appeal held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on part of the employer, the employers breach caused the employee to resign and the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

3.3. In *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR908, CA the Court of Appeal affirmed the decision in *Western Excavating* to the effect that an employee is not justified in leaving

employment and claiming constructive dismissal merely because the employer has acted unreasonably and further, the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there is a constructive dismissal.

4. The Evidence

4.1 There was an agreed bundle of documents totaling 336 pages which was supplemented by page 82a which was a different advertisement for the job the Claimant said he applied for, the one relied upon by the Respondent being at page 82. References to page numbers in this judgment are to page numbers in the bundle.

4.2 I heard evidence from the Claimant who was cross-examined and re-examined. I note that on Wednesday 04 July the Claimant was taken ill and unable to continue until Monday 09 July. Up until that time, he had represented himself, but on 04 July was represented by Mr Price-Rowlands.

4.3 The Respondent did not call any witnesses to give evidence, although witness statements had been produced and exchanged with the Claimant. The Respondent's witnesses were to be Mr S. Heraty, the Claimant's Line Manager, and Mrs S. Oakley, the Respondent's HR Resolution Manager.

4.4 At the end of the Claimant's evidence, I asked the Claimant to confirm the reason for his resignation. He said it was because of bullying and harassment in the workplace and because Mr Heraty, in particular, took no action to resolve these issues. During his evidence, he said that the bullying and harassment he suffered caused him to develop severe depression and he was unable to raise grievances because he was too ill to do so and his health was his priority.

4.5 At the Preliminary Hearing in this matter, the Claimant raised a number of acts or omissions upon which he relied as breaches of an express or implied term of mutual trust and confidence by the Respondent. These were:

- (a) Events on 23 April 2015.
- (b) Events in January 2016.
- (c) The delay in responding to his queries about his contract of employment from May to December 2015.
- (d) Entrapment by Mr Markley when he was told at an investigation meeting on 03 February 2016 he had made two incorrect deliveries when there was only one.
- (e) 25 February 2016 when he found out at the Disciplinary Hearing that Mr Heraty had deliberately withheld a witness statement which was beneficial to his defence.
- (f) 06 March to September 2016 when Mr Heraty failed to respond to his concerns raised by the Claimant in a letter of 16 November 2015.

- (g) Between January and April 2016 being deliberately being held up at a delivery site by two employees, Mr Broadhurst and Mr Piff and raising this issue with Mr Heraty who took no action.
- (h) Between June and October 2016 regularly asking Mr Heraty what was being done to resolve his contract issues as Mr Heraty did nothing.
- (i) On 20 October 2016 being told by Mr Broadhurst to come off his break after 8 minutes when he was entitled to two 30-minute breaks per shift.
- (j) On 25 October 2016 being called to attend a disciplinary investigation on the basis of evidence fabricated by a Mr Green.
- (k) 12 November 2016 being called to attend a Disciplinary meeting based on evidence fabricated by the Investigating Officer, Mr Heal, and being put through an unjustified Disciplinary Hearing on 17 November 2016 when it was found there was no case to answer.
- (l) On 13 January 2017 when Mr Heraty sent an employee driver to the Claimant's house to hand deliver a letter about his non-attendance at a health review meeting, thereby disclosing the Claimant's home address and the Claimant having attended an Occupational Health Review on 04 January 2017.
- (m) Mr Heraty giving a previous manager the Claimant's details and getting him to ring the Claimant on New Year's Eve, leaving a message on his voicemail.

4.6 Throughout his evidence, the Claimant made many references to his depression which he used to explain why for a considerable period of time of around six months he failed to resign, despite having asserted that the Respondent's conduct was such that he was entitled to resign. There were many occasions when the Claimant was asked to give evidence as to how many times he chased the Respondent's People Services and Mr Heraty over his contract issue. Apart from one letter to People Services (page 103) which was logged by the Respondent (page 103a), the Claimant was unable to evidence any contact with Mr Heraty or People Services regarding his request for information.

4.7 The same applied to the Claimant's alleged complaints to Mr Heraty about the behaviour of work colleagues which he said amounted to bullying and/or harassment. He was unable to produce any evidence to show he ever made such complaints on as many occasions as he claimed. It is also evident from the documents that both Mr Heraty and Mrs Oakley advised the Claimant to raise a grievance if he considered he was being bullied or harassed.

4.8 The Claimant was also prone to speculate and state as fact matters which he could not possibly produce hard evidence about. The clearest example of this involves an alleged incident on New Year's Eve on 2016. At (page 229) the Claimant emailed the Respondent about a voicemail message he received on New Year's Eve asking who it was, why the person was contacting him and why he was doing so, so late in the evening. This was passed to Mr Heraty who responded by email (page 230) saying he had listened to the voicemail and believed it to be Simon Francey who had not worked by the Respondent for some three years.

Accordingly, Mr Heraty was unable to comment as to why Mr Francey would be contacting the Claimant. The Claimant's speculation, and in giving evidence he accepted it as such, was that Mr Francey and Mr Heraty were friends, so it must have been Mr Heraty who breached his confidence by giving Mr Francey his telephone number. There was, therefore, no real substance to the Claimant's allegation in this regard.

4.9 The Claimant was repeatedly questioned in cross-examination as to why he did not raise a grievance in relation to the various issues he claimed to have raised with the Respondent. He said he had been too ill to do so and he treated his health as a priority. He further alleged that Mr Heraty was not supportive when he was on sick leave between November 2016 and his resignation in June 2017 and was merely responding to the Claimant's regular updates as to his health. I note that the Claimant's ill-health was not mentioned at all in the issues agreed between the parties at the Preliminary Hearing. In his submissions, Mr Price-Rowlands accused the Respondent of failing to implement any of the recommendations of Dr. Desai, the Respondent's Occupational Health Physician, but this was not listed in the issues either and the Claimant was not, in any event, actually at work. Between January 2017 and the Claimant's resignation, there are a number of email exchanges between Mr Heraty and the Claimant in which Mr Heraty wishes the Claimant well and offers him support (pages, 234a, 238a, 240a, 245a and 248a). Throughout this period of time, the Claimant kept Mr Heraty advised of his health issues and, towards the end of that period, confirmed that his depression was much better although he was having significant problems with hemorrhoids.

4.10 The Claimant also complained that in a Disciplinary meeting, Mr Heraty withheld a copy of a statement from a Mr Waqas which would have vindicated the Claimant and shown he was not responsible for delivering goods to the wrong bay at Jaguar Land Rover. This statement is at (page 120) and the disciplinary notes dated 25 February 2016 are at (pages 121-135). At (page 130) there is an exchange between the Claimant and Mr Heraty where Mr Heraty clearly confirms that Mr Waqas had refused to give a statement after being asked a few times by his Line Manager. Mr Heraty then said he would take into account the statement by Mr Waqas, which he had not seen until it was handed to him by the Claimant, and it is clear he did just that. There is no evidence before me that Mr Heraty had seen the statement of Mr Waqas prior to the Disciplinary Hearing and the Claimant acknowledged that Mr Waqas gave him the statement directly.

4.11 The Claimant was also unconvincing in alleging that evidence had been fabricated as part of a campaign to target him and force him out of the Respondent's employment.

4.12 I also found the Claimant's evidence of being forced to sign a single page of his contract of employment by an HGV driver employed by the Respondent who visited the Claimant at his parent's home unreliable. The Claimant was unable to explain how anyone at the Respondent knew where his parents lived, but did confirm that he received a contract of employment from the Respondent describing his job title as Warehouse Operative/Van Driver. Although he requested information about his job title and duties, the Claimant confirmed that he was never asked by the

Respondent to do anything other than drive a van and he did not advise the Respondent that he was working under protest and continued to work to that contract.

4.13 The above matters lead me to believe that the Claimant's evidence could not be relied upon. Not only is his evidence sometimes speculative, but he was unable to produce evidence to support many of his allegations. In others, the documentary evidence was clearly against him. I also noted that there were several incidences of the Claimant attempting to give evidence that had not been mentioned either directly or indirectly in his witness statement.

5. The Facts

5.1 In relation to the issues I find the following facts: -

- i. The Claimant commenced employment with the Respondent on 30 March 2015 having responded to an advertisement for a van driver. He had previously worked as a driver for the Respondent on an Agency basis for three years. He was paid a salary rather than an hourly rate and only undertook duties as a van driver. He signed a contract of employment on 23 April 2015 which had previously been sent to him by the Respondent which described him as a warehouse operative/van driver.
- ii. After successfully completing his probationary period on 28 June 2015, the Claimant continued to work to his contract although did have a period of sickness absence after a car accident.
- iii. On 16 November 2015, the Claimant requested information about his job title and hourly rate of pay, which did not receive a written response. However, he continued to work to his contract and raised no further issues regarding it.
- iv. On 27 January 2016 the Claimant allegedly made a delivery to the wrong bay at Jaguar Land Rover and attended an investigatory meeting on 03 February 2016 and a disciplinary meeting on 25 February 2016 at which he was given a verbal warning.
- v. On 28 June 2016 the Claimant was granted a variation to his hours of work reducing them from fifty to forty-eight in order that he could assist with looking after his disabled father.
- vi. On 27 October 2016 there was an investigatory meeting into alleged damage to a company vehicle, namely, its wing mirror. This was followed by a disciplinary meeting on 17 November 2016. The Claimant had failed to comply with the Respondent's damage reporting policy and claimed that the wing mirror in question had already been damaged prior to the incident when it fell out of its casing when he was driving the vehicle. No action was taken against him.
- vii. On 21 November 2016 the Claimant was signed off sick and never returned to work. He spent an extended period abroad in Pakistan between 22 March and 09 May 2017 having previously been assessed by the Respondent's Occupational Health Physician on 04 January 2017. He was further assessed by that Physician on 30 May 2017.

viii. On 26 May 2017, the Claimant queried his pay (page 254). It then transpired he had been overpaid in accordance with the Respondent's company sick pay scheme quite substantially.

ix. The Claimant resigned with immediate effect on 23 June 2017. In his long letter of resignation, he made a series of allegations relating to workplace harassment and bullying and issues with his contract of employment and was invited to attend a Grievance Hearing (page 275) which he refused to attend. (page 274).

6. Submissions

6.1 After the Claimant's evidence, Ms. Razaie made an application to strike out the Claimant's claim under Rule 37 on the basis that it had no reasonable prospect of success. Her application appeared to be in the same form as her submissions and she agreed this to be the case. After making her application, she confirmed she would be calling no evidence and I invited Mr Price-Rowlands to respond to the application and make his submissions at the same time and both parties agreed this would be a sensible course of action.

6.2 In relation to the breach of contract claim, Ms. Rezaie made the point that the Claimant had previously agreed the bundle of documents showing his job description as warehouse operative/van driver and for the first time at the Hearing had produced the same advertisement with the heading "Van Driver". It was not credible that another employee would be given his parent's address when the Respondent did not know that address and then force him to sign one page of a contract. The Claimant's terms and conditions of employment had remained the same throughout until varied by a reduction in his hours. He continued to accept sick pay. He had produced no evidence that there was any difference in the rate of pay between a van driver and a warehouse operative/van driver, so this claim must fail.

6.3 In relation to the constructive dismissal claim, it must fail as he had wanted too long before resigning. Only at the Hearing, had he mentioned the reason he waited so long was because he was ill and his health was deteriorating quickly. This in itself was contrary to the indications in his emails to Mr Heraty between January and June 2017 when he said he was getting better. On this basis alone, his constructive dismissal claim should fail, especially since he had accepted he was in receipt of legal advice from November 2016 onwards.

6.4 Further, as the Claimant had continued to accept company sick pay, he had waived any breach since he exercised his contractual entitlement.

6.5 Both Mrs Oakley and Mr Heraty invited the Claimant to raise a grievance, but he failed to do so in relation to any of his complaints, which is illustrative of the fact there had been no fundamental breach as, if there had been, the Claimant would surely have raised a grievance or resigned earlier. There had been no delay in responding to the Claimant's contract query as he only ever made written request.

6.6 The allegation that Mr Markley tried to entrap the Claimant by referring to two wrong deliveries and not one, could not stand as an argument. Within five minutes in the meeting, Mr Markley had corrected himself confirming that there had only been one wrong delivery.

6.7 The witness statement by Mr Waqas produced by the Claimant at the Disciplinary Hearing had not been withheld by Mr Heraty who had not previously seen it. The notes of the meeting were clear in this regard and there had been no fundamental breach, particularly as the Claimant accepted that his actions could have been interpreted as gross misconduct for which he could have been dismissed. This showed that the Respondent was not targeting the Claimant as he could have taken this course of action.

6.8 The Claimant's allegation is that Messrs. Broadhurst and Piff deliberately held him up to make him stay late at work between January and April 2016 could not be true especially since Mr Broadhurst did not commence work for the Respondent until after April 2016. The Claimant did raise this with Mrs Oakley who advised him to raise a grievance which he failed to do.

6.9 There had been no fabrication of any evidence against the Claimant and, in relation to the damage to the company van, no action had been taken against him. Indeed, the Claimant had been obstructive and evasive and tried to be clever in tripping up the Respondent as to the date on which the incident occurred.

6.10 There had been no fundamental breach in relation to the telephone call the Claimant received on New Year's Eve in 2016 and Mr Heraty had answered his queries in this regard.

6.11 Ms. Razaie submitted that none of the acts or omissions relied on by the Claimant could amount to a fundamental breach and, in any event, he had waited too long to resign. In relation to the recommendations in the Occupational Health Reports, there had been no fundamental breach in the Respondent not implementing them as the Claimant had been on sickness absence and the Respondent could not do so.

6.12 For the Claimant, Mr Price-Rowlands said that the Claimant's account should be accepted since the Respondent had called no evidence to rebut it. Limited value should be given to the Respondent's witness statements as they did not give evidence and were not cross-examined. There was a material difference between the position applied for by the Claimant and the one to which he was appointed. The one produced by the Respondent at (page 82) clearly had a different typeface indicating that the words "van driver" had been added later.

6.13 The Claimant's account of repeated requests for clarity on his job description and raising various matters regularly with Mr Heraty should be accepted as Mr Heraty had given no evidence.

6.14 In relation to the wrong deliver, it should be accepted that the Claimant's account was correct because his company mobile records had been deleted, Mr Markley had wrongly accused him of making two wrong

deliveries and Mr Waqas had already sent his witness statement to Mr Heraty who did withhold it.

6.15 In relation to bullying, Mr Price-Rowlands said it was for me to evaluate the voracity of the Claimant's evidence. He had said he had told Mr Heraty about it but no action was taken. He had received no support from management.

6.16 In relation to the damage to the company vehicle, the Claimant had not filled in an accident log as there had been no accident. There was a strong inference that all of these matters showed that the Respondent was trying to get at the Claimant. The wing mirror incident revealed that it was common knowledge that the mirror had already been damaged.

6.17 Further, Mr Price-Rowlands said that the Respondent's failure to implement the recommendations of the Occupational Health Physician were a fundamental breach of contract in that the Respondent had failed in its duty of care to the Claimant.

7. Conclusions

7.1 Dealing firstly with Mr Price-Rowlands submissions, I do not accept the premise that the Claimant's account had to be given more weight because the Respondent did not call any witnesses. The standard of proof is the balance of probabilities and, in most respects, for reasons outlined above, the Claimant failed to satisfy that burden. There was arguably some merit in relation to the breach of contract, but the Claimant had not raised a grievance and, if this had been capable of amounting to a fundamental breach of an express or implied term of his contract of employment, he should have resigned immediately or at least raised a grievance. There is more merit in Ms. Razaie's argument that the Claimant acted in accordance with his contract at all times and never indicated he was working under protest. In the event, there was no evidence before me to evidence any financial loss on the part of the Claimant who merely indicated that a colleague had told him he was being underpaid. I do consider it was somewhat unreasonable of the Respondent not to have replied in detail and in writing to the Claimant in response to his request, but his remedy in relation to raising a grievance in particular was available to him but ignored.

7.2 The thrust of Mr Price-Rowlands argument was that the evidence pointed to the Claimant being targeted by his colleagues, some individually and others on behalf of the Respondent but speculation on the part of the Claimant is not sufficient to satisfy the burden of proving these allegations. Further, the reliance on the Occupational Health Report was not an issue before the Tribunal. This has two consequences. Firstly, I cannot raise it as an issue in reaching my decision and, secondly, the Claimant in any event had not raised it before the Hearing.

7.3 I found it a curious tactic by the Respondent to make an application for a strike out under Rule 37 and then not call any evidence. The strike out application was in the same form as submissions. I did not grant the application at the time it was made, nor do I grant it now. The reason for this is that there was a glimmer of an issue in relation to the contract as a

result of the Claimant bringing in to the Hearing what he claimed was the original job application for a van driver to which he thought he was being appointed. On reflecting on the Claimant's actions, in particular in working to the contract throughout his employment, his argument that there was a breach of contract must fall away. But, in any event, no evidence of any loss or losses arising in the ordinary course of events from any breach was put before me.

7.4 The essential question in this case is whether there was a fundamental breach of contract by the Respondent. Whilst, as mentioned above, it may have behaved unreasonably in relation to the Claimant's request for information in November 2015, following the decision in the Bournemouth case, this is not sufficient to amount to a fundamental breach of contract.

7.5 In relation to the other matters, I find they are based on the speculation of the Claimant, the lack of any evidence that the acts or omissions actually happened and the fact that the documentary evidence did not support any of his allegations of a fundamental breach of contract. Further, I found some of his allegations to be implausible such as an employee being sent to his parent's address to force him to sign a contract of employment.

7.6 The Claimant referred on a number of occasions to the Respondent's duty of care towards him. There is such a duty of care owed by an employer to its employees but there is clear documentary evidence of that duty of care being complied with by the Respondent in relation to the Health Review Meetings, the referral to Occupational Health, the emails of support and helpful information sent by Mr Heraty and the fact that the Respondent overpaid the Claimant quite substantially, yet did not seek to recover that overpayment.

7.7 Even if there had been a fundamental breach of an express or implied term of the Claimant's contract of employment, following the decision in Western Excavating, he waited too long before resigning. There was a period of some six months from the last act of the Respondent of which he complains and his resignation. He justifies this delay by referencing the rapid deterioration in his health due to depression. Again, however, this was not listed as an issue at the Preliminary Hearing and was not mentioned by the Claimant prior to the Hearing. In any event, the allegation is not borne out by the Claimant's own emails to Mr Heraty which clearly stated towards the end of his employment that he was getting better.

7.8 In all the circumstances, therefore, I must find that the claims are not well founded and I dismiss them.

Employment Judge Butler
27 July 2018