EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P James	**v**	Huisman International (UK) Limited

Heard at: Bury St Edmunds **On:** 7 December 2018

Before: Employment Judge Postle

Appearances
For the Claimant: Mr S Brady, Counsel
For the Respondent: Ms S Ismail, Counsel

RESERVED JUDGMENT

The claimant was unfairly dismissed.

RESERVED REASONS

1. There originally was a preliminary issue in relation to an alleged protected conversation under section 111A of the Employment Rights Act 1996, namely whether a conversation that took place on 12 February 2018 between the claimant and the respondent's Managing Director, Mr Scholten was a protected conversation under s.111A of the Employment Rights Act 1996; and thus, whether that conversation could indeed even be referred to in the course of these proceedings.

2. That preliminary issue appears to have abated as both Counsel have confirmed at the outset of this hearing that the conversation taking place on 12 February 2018 can be referred to.

3. In simple terms, there is a dispute between Mr James and the respondents, particularly Mr Scholten, as to whether on 12 February 2018 Mr Scholten actually dismissed the claimant or whether that was merely a preliminary discussion about a possible settlement agreement.

4. In this tribunal we have heard evidence from the respondent's Managing Director, Mr Scholten, who gave his evidence through a prepared witness statement. There was to be a witness also from the respondent's, a Mr Janssen, however the tribunal was told at the outset of the hearing he would not be attending.

5. For the claimant, he gave evidence again through a prepared witness statement.

6. The tribunal also has the benefit of a bundle of documents consisting of 171 pages.

7. The issues are agreed as referred to above.

8. The tribunal also has the benefit of skeleton submissions on behalf of the claimant.

The Facts

9. The claimant had been employed by the respondents since October 2004 at the respondent's depot in Corby. The company is a Dutch company largely run at a distance from Holland and the depot in Corby is effectively run by the claimant, co-ordinating the warehouse and transport activities.

10. It is common ground that until December 2017, the claimant got on well with the respondent's Managing Director and there had been no complaints about his performance, and indeed the claimant had an unblemished disciplinary record.

11. There had been discussion about getting a warehouse supervisor at Corby. It was agreed one would be recruited from outside as there was no one suitable within Corby warehouse. The claimant commenced interviewing for the warehouse supervisors position, however, that was put on hold following an email from the Financial Controller advising the claimant not to do anything further about recruitment until he had spoken to the Managing Director or Mr Janssen.

12. Subsequently, Mr Scholten phoned the claimant to advise that he would clarify the situation in the near future about recruitment. It subsequently transpired that the Dutch side of the organisation had sourced a new warehouse supervisor, a Dutch person. That person was personally known to Mr Janssen. His name was Tim Van Haren. He would apparently be travelling from Germany to the UK each week and stay in an hotel whilst in Corby. The claimant was surprised at this decision, feeling it made no sense and certainly was not a cost saving.

13. It appears that once Mr Van Haren arrived at Corby an atmosphere was created by him in that his approach was the better approach. There was clearly tension between the parties that also resulted in problems with

existing customers and deliveries. In January 2018, the claimant was on holiday and whilst on holiday he received a WhatsApp message from Mr Scholten enquiring if he was having a nice holiday and that he was planning to visit the claimant on his return the following Monday for a look around the warehouse. The claimant arrived at work at 6 am on the Monday, he noticed immediately that all his files relating to one of the respondent's customers had been removed from the claimant's desk and were now on Van Haren's desk. Van Haren was not yet in the office.

14. Mr Scholten arrived on the morning at approximately 10 am and he apparently went straight upstairs which is not normal. Shortly thereafter Mr Scholten asked the claimant to follow him upstairs for a chat. When they entered the office, Mr Scholten said, *"…this was not going to be a good conversation".* The claimant was then advised he was no longer wanted by that his services for the respondent. At that point Mr Scholten slid some documentation towards the claimant. The claimant was informed this was a settlement offer and that the claimant needed to obtain professional advice. The claimant was advised he had ten days to sign the agreement and in that period the claimant could retain the car and credit card. The claimant asked if he was to leave now and not come back and the claimant was informed that was correct. He was told by Mr Scholten that he would make excuses to the other staff but in the meantime the claimant was not to discuss matters. The claimant went downstairs, got in his car and drove home. It is clear the claimant was told this was the end of his employment.

15. Mr Scholten alleges he was reading from a prepared email of 8 February (at page 78), in which the conversation was always 'without prejudice', the claimant asserts that was never indicated.

16. The document reads,

"Perry, I'd like to have a without prejudice conversation.

After 1.5 years of intensive contact and improvement projects, I do not trust that you are the right person on the job. We have offered support, but I feel that there is a lot of improvement to be made;

You've been with me for a few years now that's why I'd like to offer you a settlement agreement to end your employment now and compensate you accordingly. This is offered as a gesture of good will and is to spare you being taken through a formal performance management process;

You have ten days to take legal advice on the agreement from a solicitor and that I will pay £250 + VAT towards any legal fees in seeking this advice;

The offer is open for 10 calendar days.

If you do not wish to accept this agreement then I will need to go through a performance management process with you.

You do not need to attend work whilst you take advice on this agreement, this agreement is confidential so to explain your absence I will tell staff that you are taking personal leave so that they can cover, but we will not talk to them about this agreement, nor offer any further details and would ask that you do the same. So, I want you to go home and consider this settlement in the next ten days."

That document had in fact been prepared by the respondent's solicitor for Mr Scholten to read. The claimant denies that it was ever said if he did not accept the agreement then a performance management process would be started. The tribunal accept that was never said.

17. There is then an exchange of text messages between the claimant and the respondent's solicitors in which the claimant on 16 February 2018 raised some questions,

"Hello John, I have today been with my solicitor, he is reviewing the document and will send me his feedback on Monday. He has asked me to get confirmation from yourself / Huisman that the company vehicle is still insured for me to drive up until 21 February 2018. Kind regards, Perry"

18. That was met with a response confirming the company vehicle was insured until that date. The relevance of the date being effectively ten days after the meeting and this the end of the claimant's employment.

19. Then on 19 February the claimant writes to Mr Scholten (page 82) and the contents of that document are relevant,

"Dear John, I write following my dismissal on 12 February when you handed me a settlement agreement. I am utterly astounded at this decision after 13 years devotion to the company, there is no reason for my dismissal and it has already taken a severe effect on my health.

As requested, I am now taking legal advice on the nature of and the effect of the agreement.

I am advised as there has been no performance issues and my job clearly needs to be done and indeed I believe that I am more competent than Tim Van Haren or other potential replacement, therefore I have a valid claim for unfair dismissal.

If I pursue a claim for unfair dismissal then I will be entitled to receive two types of award."

He then sets out the types of award he would be entitled to and refers to the fact that the agreement does not include a clause providing the

claimant with an agreed reference and the final paragraph which is of relevance reads,

"To add that I am disappointed after we agreed to keep details quiet, I find out that Tim has advised some people in Corby of the situation, also a member of the planning team in Wijchen has openly discussed the position I find myself in with a contractor.

Yours sincerely, Perry James"

20. That letter surprisingly was not met with a response by the respondent's Managing Director Mr Scholten, or his solicitor saying words to the effect of, *'no, you have not been dismissed, you have got it all wrong'* - there is simply no denial that the claimant had been dismissed at the meeting.

21. What then occurs is the respondents write to the claimant on 1 March requesting the claimant attend a poor performance hearing in the Dutch offices on 6 March setting out a couple of allegations. The claimant declined to attend, until he was able to take some further legal advice. In the meantime, the claimant's pay ceased by 2 March, if the claimant had not been dismissed on the 12th the respondents certainly felt he was dismissed on 2 March as they were no longer paying him. There is then a further request for a meeting again about poor performance and disciplinary to take place on 19 March, which took place by Skype. The claimant took part and the person conducting the meeting Mr Janssen produced no evidence of any customer complaints backing up any poor performance allegations. The allegations were clearly fabricated to try and back track over the dismissal on the 12th February.

22. The claimant still being somewhat confused at the way he was being treated after his long service and the confusion as to exactly what the position was, emailed the respondents on 23 March 2018 in the following terms,

"Dear John,

As you are aware from previous correspondence I considered I was dismissed at the meeting when you handed me the proposed settlement agreement.

At that meeting on 12 February you advised me that you no longer wanted me to work for the company Huisman, in utter shock I asked you, 'Why?' *and,* 'Is that it after 13 years' service?'*, you said that is correct, you also advised me that I was to leave straight away. I asked you,* "Am I to leave and not come back?' *You agreed that is what you want.*

As a result, I regard myself as having been dismissed on that day and I have confirmed that in writing to you by my letter of 19 February.

Notwithstanding that letter, I was called to a disciplinary hearing by Bear Janssen which took place at the Corby office of Huisman on 19 March, I made it clear that I was attending under protest and that any monies being received by me from the company were my notice payment to which I am entitled following my dismissal.

The disciplinary meeting was a complete travesty, Mr Janssen did not attend, he conducted the meeting via Skype. All the points put to me I was able to explain, it was clear these were all trumped up charges to justify my potential removal. One of the major issues which had been raised was with regard to complaints by customers. Bear (Janssen) failed to produce any complaints from customers. I know that Four Seasons complained about Tim and his utter failure to deal with them as an important customer, but again despite my request Bear failed to produce any of these emails or correspondence relating to the problems with Four Seasons.

I have now found out that I have only been paid for the 1st and 2nd of March despite Bear calling me to a meeting which he treated me as an employee. At the end of the meeting Bear advised that he would get back to me as soon as possible, five days later he has not had the decency to come back to me. Therefore, if I have not already been dismissed please accept this letter as my formal resignation, the basis of constructive dismissal as a result of your failure to pay any salary as you considered that I was still an employee. I am also resigning on the basis of the disciplinary meeting being used in an oppressive, intimidating and unfair manner. If I have not already been dismissed I could not have been returned to work because of the way I have been treated.

I will of course be pursuing a claim for unfair constructive dismissal and compensation and a basic award for my years of service."

23. Unbelievably, on 23 March 2018, no doubt when the email had been received by the respondent, they purported to send to the claimant a letter in which a final written warning was given.

24. Then on 26 March (page 162), the respondent responds acknowledging the claimant's resignation and for the first time disputing that the claimant was dismissed on 12 February 2018.

25. The question thus arises, was the claimant dismissed on 12 February? Or was he constructively dismissed by the actions of the respondent between 12 February and 23 March 2018?

The Law

Actual dismissal

26. Section 98 of the Employment Rights Act 1996 states,

> (1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
>
> (a) the reason (or, if more than one, the principal reason), for the dismissal, and
>
> (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held
>
> (2) A reason falls within this sub-section if it:
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind for which he was employed by the employer to do;
> …..
>
> (4) Where the employer has fulfilled the requirements of sub-section (1) determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer);
>
> (a) depends on whether in circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

27. In capability dismissal it would be normal for the claimant / employee to be informed of the shortcomings in that person's capability and how they can be overcome and in what period such shortcomings should be overcome and a clear warning at the future if those shortcomings / capabilities are not remedied, the possible outcome could be dismissal.

Constructive dismissal

28. Section 95(1)(c) of the Employment Rights Act 1996 states,

> There is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as constructive dismissal.

29. In order to claim constructive dismissal, the employee must establish:

    29.1 that there was a fundamental breach of contract on the part of the employer;

    29.2 that the employer's breach caused the employee to resign;

    29.3 that the employee did not delay too long before resigning, thus affirming the contract in losing the right to claim constructive dismissal;

    29.4 a breach can be a breach of an express term of the contract or a breach of the implied terms of trust and confidence. In those circumstances the tribunal will be looking to see whether the employer has behaved in such a way towards an employee which is likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Conclusions

30. This is a case where the tribunal are simply asked to decide the reality of what actually took place in the conversations of 12 February 2018 between the claimant and the respondent's Managing Director Mr Scholten and whether or not Mr Scholten actually dismissed the claimant at that meeting or whether it was merely a preliminary meeting in which the possibility of a settlement was being discussed.

31. Having heard both parties give evidence and looked at the surrounding facts, the tribunal concludes that when the parties met on 12 February 2018, Mr Scholten did say to the claimant at the outset of the meeting,

    "This was not going to be a good conversation".

    That was followed by the fact that the respondents, particularly Mr Scholten, no longer wanted the claimant to work for the respondent. In fact, the implication from the surrounding facts was that Mr Van Haren was being brought in as the Dutch's own Manager to run the Corby warehouse for reasons best known to the respondents. It is clear that the claimant was told there was a settlement on the table, hence the documents that were pushed towards the claimant on the table and at that point he was advised he needed to seek legal advice.

32. It was clear dismissal was taking place and the claimant was informed he had ten days to sign the agreement and that during that period the claimant could retain the car and credit card, there would be no reason to add those words if dismissal was not to take place in any event. The claimant was told to leave and not return.

33. Further evidence if required that the claimant was dismissed on that day, is that when the claimant writes to Mr Scholten (page 82), on 19 February 2018 the letter starts,

"I write following my dismissal on 12 February when you handed me a settlement agreement. I am utterly astounded at this decision after 13 years devotion to the company, there is no reason for my dismissal and it has already taken a severe effect on my health…"

Clearly, if the claimant had not been dismissed at the meeting on 12 February 2018 then it begs the question why, either Mr Scholten or those advising him, simply did not respond immediately saying, '*you've got it all wrong, you were not dismissed, you've got the wrong end of the stick…',* or words to that effect. That simply did not happen. It appears shortly thereafter, the claimant's pay ceased. The claimant clearly had been dismissed at the meeting on 12 February.

34. The implication is that thereafter, when the respondents realised they were in a bit of a muddle then purported to go through some sham capability process which was clearly fabricated in order to cover up the dismissal that had already taken place.

35. The tribunal concludes clearly there was a dismissal and that dismissal was procedural and substantively unfair.

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Employment Judge Postle

Date: 25/2/2019

Sent to the parties on: 25/2/2019

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For the Tribunal Office