



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr S Warren

Edward Vinson Limited

Heard at: London South
Employment Tribunal

On:

13 and 14 April 2021

Before: Employment Judge Hyams-Parish
Members:

Representation:

For the Claimant:

In person

For the Respondent:

Mr Kohanzad (Counsel)

RESERVED JUDGMENT

The claim of constructive unfair dismissal fails and is dismissed.

REASONS

Claims and issues

1. By a claim form presented to the Tribunal on 20 December 2019, the Claimant brings claims against the Respondent of constructive unfair dismissal.

Practical and preliminary matters

2. During the hearing, the Tribunal heard evidence from the Claimant and two witnesses on behalf of the Respondent:
 - 2.1. Dr Graham Clarkson, Breeding Director.
 - 2.2. Andrew Dunn, Finance Director.
3. During the hearing, the Tribunal was referred to documents in a bundle extending to 391 pages. References to numbers in square brackets in this Judgment are to page numbers in the hearing bundle.
4. This case had been listed for 3 days. However, evidence was concluded on the morning of the second day and an oral judgment was given to the parties late morning. This written decision is provided at the request of the Claimant by email on 19 May 2021.

Background findings of fact

5. The following findings of fact were reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
6. The Claimant was employed by the Respondent from 16 February 1987 until he resigned by letter dated 28 June 2019. He was employed as a soft fruit breeding manager.
7. On 24 May 2019, Dr Clarkson wrote to the Claimant following up a conversation earlier that day, but also referred to a previous discussion between them on 16 May 2019. During both discussions, Dr Clarkson raised his concerns about the Claimant's misapplication of pesticides on fruit. The above-mentioned letter goes on to say as follows:

The company believes that the health and safety of staff members may have been placed at risk as a result of misapplications. In addition, there is the potential for the causing of significant financial and operational damage to the business,

We are obligated to fully investigate the issue and we will also investigate some other concerns relating to your actions and performance in 2019. The issues that are to be investigated specifically relate to:

- ***Pesticide application at Kemsdale***
- ***George Boreham's development as your number two***

- **Production of raspberry plants**
- **Production of blueberry seedlings**

The investigation is to be conducted by me with the assistance of Andrew Dunn. As part of the investigation, you will be interviewed along with other individuals which, you will appreciate, will take us some time. However, we will endeavour to complete the investigation as quickly as possible. When we have completed the investigation, we will write to you to confirm whether you will be required to attend a disciplinary hearing. If we consider there are grounds for disciplinary action, we will inform you of those grounds in writing together with supporting evidence. You will, of course, have the opportunity to state your case at any future disciplinary hearing.

8. There then followed what I can only describe as a detailed and thorough investigation into the above matters. An investigation report was produced which was 213 pages long. The report was provided to the Claimant with the letter referred to below.
9. As a result of the investigation, the Respondent took the view that there was a case to answer and invited the Claimant to a disciplinary hearing. The invite to the disciplinary hearing, dated 21 June 2019, said as follows:

Dear Simon

Formal notification of invite to Stage 3 Capability Hearing

You will recall that I informed you on 24 May 2019 that Edward Vinson Limited (the company') was concerned about the possible misapplication of pesticides. I advised you that this had potentially extremely serious consequences for the company.

You will further recall that prior to this on 16 May 2019; I met with you and Adam Tyler and stated that forthwith all spray applications had to be approved in by me in writing. This was subsequently confirmed in my email to you and Adam on 20 May 2019.

In addition to the serious concerns about the possible misapplication of pesticides, the company had a number of additional concerns relating to your actions and performance in 2019.

As a consequence, I informed you that an investigation was to be undertaken with the assistance of Andrew Dunn.

As part of this investigation, you were interviewed by Andrew Dunn and I on 29 May 2019.

Having now completed the investigation, which included interviewing a number of your colleagues, I must inform you that the company has taken the decision to proceed to a formal stage 3 capability hearing to consider a number of matters relating to possible gross negligence and capability in conducting your role.

Please note that you are required to attend a formal hearing. This hearing will take place in the meeting room at Ewell Barn, on Tuesday, 2 July 2019 commencing at 0930.

The hearing will be chaired by Rick Cook, Director, of Edward Vinson Limited.

Andrew Dunn and I will attend the hearing to present the substantial amount of evidence obtained during our investigation.

You have the right to be accompanied at the hearing. Your companion may be either a work colleague or an accredited trade union representative of your choice. Your companion will be permitted to address the hearing (but not answer questions on your behalf) and to confer with you during the hearing. You should inform me in advance of the identity of your companion.

While the investigation has revealed a number of wider areas of concern the specific allegations against you at this time, which will be considered at the hearing, are as follows:

- 1. You have failed to adhere to prescribed harvest intervals of pesticides used.**
- 2. You have failed to follow instructions relating to the following of commercial practice for advanced trials.**
- 3. You have attempted to conceal the use of Intercept. This is also potentially a misconduct issue in the event that you are found to have deliberately concealed the use.**
- 4. You have demonstrated a serious and negligent lack of knowledge and you are unwilling to take and follow advice from external advisers.**
- 5. You have made unilateral decisions that are contrary to advice and instruction.**
- 6. You have failed to train George Boreham despite this being a task that you were asked and instructed to undertake.**
- 7. You have failed to deliver, in the timeframe, the requisite number of raspberry cuttings for 2019, which is the second year you have failed to achieve this.**
- 8. There has been a failure of the blueberry seedling programme in 2019.**
- 9. You planted the wrong family for the James Hutton project.**
- 10. The wrong harvest interval was stated on your spray request for Talius/Teldor.**
- 11. You have failed to make the requisite number of Spanish strawberry crosses in the Spring of 2019.**

12. Your colleagues and the company no longer have trust and confidence in you to undertake your duties to an acceptable level given the nature of your position and seniority.

It is important to say that the issues are extremely serious leading to significant financial loss and reputation for the company. In addition, the issues could have serious health and safety consequences for staff and our customers. Moreover, to date, you have failed to acknowledge the severity of the issues and take responsibility for your actions. This is reflected in the content of your email to me dated 27 May 2019.

For your information, please find enclosed a copy of the investigation report and supporting evidence collated during the investigation, which will be referred to at the hearing.

At the hearing you will, of course, be given full opportunity to explain your case and answer the allegations. You may ask questions, dispute the evidence, provide other evidence and otherwise argue your case. You may also put forward any mitigating factors that you consider relevant to your case. Due consideration will be given to any factors or explanations that you raise when considering what, if any, disciplinary sanctions are to be imposed.

The company will not take any formal action against you until you have had the opportunity of putting forward your point of view and explanation. However, it is important I advise you that in view of the severity of the allegations and their consequences, particularly in relation to the misapplication of pesticides, which may amount to gross negligence, and possible concealment of Intercept, which may amount to gross misconduct, this could lead to your dismissal from your employment.

I have given serious consideration as to whether you should be suspended from your employment. Having done so, I have taken the decision not to suspend you at this time. However, you will be expected to maintain regular contact with me during working days. This should include you reporting to me at the start of each working day at 7.30am and update me at the end of the day at 4.15pm. Please also note that suspension will remain under review.

If, in the meantime, you have any questions arising from my letter please do contact me directly.

Yours sincerely

Graham Clarkson Breeding Director

10. The Claimant resigned by letter dated 28 June 2019 which said as follows:

Dear Dr. Clarkson,

I am compelled to address your attack on my ability to perform my duties in so much as this process is affecting my health and is having a serious impact on my wife's health. I have not slept properly since you first began your investigation.

Your primary accusation is the misuse of pesticides, but this years' applications up to the start of this process have been almost identical to those applied in 2017 and 2018. You should have had a complete record for both years and did not bring any issue of misuse to my attention for correction.

The other points you originally raised are in some part a consequence of the increasing workload and the failure to recruit suitable skilled staff.

Most of the subsequent issues since you informed me of the investigation are a result of the stress caused to me by this investigation.

As these events have evolved it now appears to me that you have been preparing for this for over a year as you arranged to buy my present accommodation in September 2018.

You are also aware there is no risk of harm to anyone eating the fruit that was sprayed. In previous years I have been supplying my family and friends with the fruit from the trials and I most certainly would not apply anything that would harm them particularly their children.

But I know that all of this is irrelevant because if you can consider that my informing the Chairman of Edward Vinson Ltd of my use of Intercept is concealment then this process will not be fair and impartial.

As you obviously have an agenda to replace me with a cheaper option and you no longer appreciate the contribution that I make, I regret that I am unable to continue working under this intolerable strain.

Therefore, I have no alternative than to offer my resignation and to give you one month's notice.

Yours sincerely,

SP Warren

11. When I asked the Claimant in evidence what was it that triggered his resignation, the Claimant referred me to the paragraph in the invite letter which is underlined above at paragraph 9. I should make clear that this paragraph has been underlined in this judgment for ease of reference and was not underlined in the letter itself.

Legal principles

12. Section 95(1)(c) Employment Rights Act 1996 ("ERA") defines what it means to be constructively dismissed:

An employee is dismissed by his employer if and 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.

13. The Claimant in this case relies on a breach of the implied term of mutual trust and confidence, which means that the employer “*shall not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee*”: **Malik v BCCI [1997] ICR 606**. The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.
14. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) says as follows:
- (1) In determining...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 subsection (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 subsection if it—***
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
- (b) relates to the conduct of the employee,***
- (c) is that the employee was redundant, or***
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
- (a) depends on whether in the 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.***
15. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether

the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

Analysis, conclusions and additional findings of fact

16. My conclusion on this case is that the Claimant elected to resign to soon. I suspect he read the paragraph he referred me to and considered that he was likely to be dismissed. However, whilst I consider that outcome to be possible, it was not inevitable. Dr Clarkson and Mr Dunn were very clear about this in their evidence. Dr Clarkson certainly considered the matters potentially serious and considered that they warranted disciplinary action. However, the matters were due to be considered by a person completely separated from the process thus far and would no doubt have brought a fresh pair of eyes to the allegations. We will not know what the outcome would have been and neither will the Claimant because he did not participate in the process or allow the Respondent to consider the matter.
17. At various points I had to stop the Claimant during his questioning because I considered that he was treating this hearing as though it was the disciplinary hearing and he wanted to give his response to the allegations. I pointed out to the Claimant that this was not my role. My role was to consider whether the Respondent had done anything, particularly by writing to the Claimant inviting him to a disciplinary hearing and warning him that he could be dismissed, amounted to a fundamental breach of the implied term of mutual trust and confidence entitling the Claimant to resign and claim that he had been constructively dismissed.
18. I was in no doubt that there had been no such breach. The Respondent was perfectly entitled, and had good reason, to investigate the complaints about the Claimant. It was not unreasonable, indeed far from it, for them to consider that there was a case to answer, and that the Claimant should be invited to a disciplinary hearing. There is nothing wrong in including the sentence which the Claimant took much offence to. It was simply putting the Claimant on notice that dismissal could be an outcome. Indeed, they would have been criticized had they not put such a paragraph in and then gone on to dismiss. It is good practice for employers to warn employees of the seriousness of a hearing they are about to walk into and to warn them that matters are so serious that the Respondent will need to consider whether they should be dismissed.
19. The Respondent cannot be said to have conducted itself in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between it and the Claimant. As there was no dismissal, there can be no unfair dismissal, constructive or otherwise. For these reasons the claim fails and is dismissed

**Employment Judge Hyams-Parish
3 June 2021**

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