EMPLOYMENT TRIBUNALS

Claimant: **Mr William Carswell**

Respondent: **Marks and Spencer Plc**

Heard at: Manchester **On:** 26 & 27 May 2022
27 July 2022 (in chambers)

Before: Employment Judge Ord

Representation:

Claimant: Mr Robert Lassey (Counsel)
Respondent: Ms Sophie Firth (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of unfair constructive dismissal is well-founded and succeeds.

2. The claimant's complaint of wrongful dismissal is well-founded and succeeds.

REASONS

The Complaints and Issues

1) This judgment deals with liability only, although Polkey, contributory fault and statutory rights have also been determined.

2) The claimant complains of unfair constructive dismissal and wrongful dismissal.

3) The respondent challenged the claimant's right to bring a claim of wrongful dismissal as it was not in the original claim form. However, at a Preliminary Hearing for Case Management on 29 October 2021 [p55] it indicates that a

wrongful dismissal complaint was being pursued. A provision was made in the Case Management Order (CMO) for the parties to contact the tribunal if they thought the list of complaints was wrong or incomplete, but the respondent did not do so. Consequently, I am satisfied that the complaint of wrongful dismissal may proceed.

4) The issues for the tribunal have been taken from the CMO of 29 October 2021. However, only the constructive dismissal and wrongful dismissal issues have been determined, as there is no need to proceed any further, given my judgment on the constructive dismissal.

5) I note from the schedule of loss, that the claimant claims a sum for loss of statutory rights, which I have added to the issues.

6) Therefore, the relevant issues are:

Constructive Dismissal

1. Can the claimant prove that there was a dismissal?

   1.1. Did the respondent do the following things:

      1.1.1. Alter the claimant's place of work despite his health condition.

   1.2. Did that breach the implied term of trust and confidence? The tribunal will decide:

      1.2.1. Whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

      1.2.2. Whether the respondent had reasonable and proper cause for doing so.

   1.3. Was the fundamental breach of contract a reason for the claimant's resignation?

   1.4. Did the claimant affirm the contract before resigning, by delay or otherwise? The tribunal will decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Wrongful dismissal

7) Did the claimant resign as a result of a fundamental breach of contract?

- If, so was he entitled to notice pay?

- If so, how much?

Polkey/Contributory Fault

8) Is there a chance the claimant would have been fairly dismissed anyway?

9) If so, should the claimant's compensation be reduced and if so, by how much?

10) Did the claimant contribute to his dismissal by blameworthy conduct?

11) If so, would it be just and equitable to reduce the claimant's award and, if so, by how much?

Loss of statutory rights

12) Is the claimant entitled to compensation for loss of statutory rights?

13) If so, how much?

Evidence

14) The tribunal had before it:

- A bundle of 290 pages;
- Amended chronology;
- Witness statements from the claimant and from the respondent's witnesses, namely, Jason Umpleby, Kristian Dear and Emma Black.

15) Oral evidence was heard on oath from the claimant, Jason Umpleby, Kristian Dear and Emma Black.

16) I have not read all the documents in the bundle, but only those that I have been taken to. Page references in brackets below are to page numbers in the bundle.

17) After the hearing, the tribunal was sent:

- Closing written submissions from the respondent including respondent's authorities;
- Closing written submissions from the claimant;
- The respondent's reply to the claimant's closings;
- The claimant's reply to the respondent's closings.

Law

18) As per **section 95(1)(c) of the Employment Rights Act 1996**, an employee is constructively dismissed 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 employer's conduct".

19) To claim constructive dismissal, the employee must establish that:

- The employer was in breach of a term of the contract of employment; and
- The breach was a repudiatory one, entitling the employer to resign; and
- The employee resigned because of that breach of contract.

The burden of proof is on the employee to establish each of the above.

20) In ***Western Excavating (ECC) Ltd v Sharp*** *[1978] ICR 221,* Lord Denning put it as follows:

"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."

21) A resignation in response to conduct by the employer which falls short of being a breach of a fundamental term, is simply a resignation.

22) The implied term of trust and confidence was formulated by the HLs in ***Malik and Mahmud v BCCI*** [1997] ICR 6060 as being an obligation 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."*

23) In ***Leeds Dental Team Ltd v Rose*** [2014] ICR 94, EAT, the EAT confirmed that the test of whether there was a repudiatory breach of contract is an objective one: *"the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in his employer".*

24) In ***Frenkel Topping Ltd v King*** **UKEAT/0106/15/LA** the EAT warned about the dangers of setting the bar too low. That decision makes it clear that acting in an unreasonable manner is not sufficient.

25) In ***Morrow v Safeway Stores plc*** [2002] IRLR 9, it was held that a breach of the duty of trust and confidence will always be repudiatory.

26) In ***United Bank Ltd v Akhtar*** [1989] IRLR 507, EAT, the EAT thought that where a discretion is conferred by an express term, there may be situations where such a discretion is fettered by the obligation to maintain trust and confidence. In this case an express mobility clause in the contract was subject to the following implied terms:
a) a duty to give reasonable notice of an intended move;
b) that the discretion must be operated such as:
    i) to make the move *"feasible", or "not [...] impossible;*
    ii) to avoid breaching the implied term of mutual trust and confidence.

27) I was also referred to a number of other authorities by the claimant and respondent, as set out in their closing submissions, which I have taken into account.

Findings of Fact

28) The claimant was employed by the respondent as a customer assistant from 3 April 2005 until his resignation on 13 August 2020. At the time he resigned the claimant was in his mid sixties.

29) He worked at the Barrow store until its closure on 28 July 2020. A new store was opening in Ulverston and there was a potential for employees to transfer to that store.

30) The claimant's contract contained a mobility clause [77], which stated:

> *"Your base store is Barrow. The Company reserves the right to require you to be interchangeable between departments at your base store and to require you to work at any other store within reasonable travelling distance."*

31) The respondent consulted the staff affected and they were given an opportunity to state their preferences for redundancy or redeployment [100]. The Barrow Resource Forum (BRF) was set up to make decisions on each employee [125; 94] using the following criteria:

- Location – postcode of home address to store address; Redeployment should be within a 20 mile radius of the Barrow store;
- Accessibility – time it takes to get to store – within an additional 30 minute commute;

32) Any appeal from the BRF was to an independent Review/Appeal Panel. Their decision was final.

33) If an offer of redeployment was reasonably refused, an employee would be made redundant with enhanced redundancy pay [90; 100].

Travel options

34) The claimant developed a fear of travelling by public transport for work some years ago whilst living in London, and this developed into him becoming an alcoholic. The respondent conceded that travel by public transport to Ulverston was not a reasonable option for the claimant.

35) The claimant had previously ridden a 50cc moped to work, but upgraded this to a 150cc motorcycle in 2019. He had a learner's license but was legally permitted to ride the motorcycle on A roads at up to 60 mph.

36) The distance from home to the Barrow store by motorbike was 2.1 miles and took about 8 minutes.

37) The options for travel to the Ulverston store were:

- Public transport: the shorter option was mainly by train (37 minutes).

- Motorbike, with three possible routes:

  i) A590 (approximately 7.2.miles and 19 minutes).
  ii) The Coast Road (approximately 12 miles).
  iii) Via Urswick (8.4 miles and 20 minutes).

- Car: the claimant had a driving licence and both he and his wife were insured to drive their car.

Meetings and decisions

38) Early in 2019 the claimant received a consultation document and wrote a note to himself saying that Ulverston was *"not a viable option due to travelling distance by public transport and the cost incurred".*

39) Five individual consultation meetings (ICM) followed; four of them were with Jakki Magee, the claimant's line manager. The third was with Jason Umpleby, Selection Manager at Barrow.

40) The first ICM with Ms Magee took place on 18 February 2019 [116-120], when the claimant stated his preference as being redundancy. Travel options were discussed. The minutes record that the claimant said he was a learner driver and would not use his moped on a main road (A590) as he was a nervous driver and had come off his moped 6 times. He only used it for the 2.1 miles journey to the Barrow store. The coast road was 5 miles longer.

41) It also recorded that, if redeployed to Ulverston, he would have to change his mode of transport. He was able to drive but his wife had the car for work. She was a teacher and needed it for transporting files and folders and occasionally a drumkit. She had rehearsals every Saturday. He had looked into various forms of transport and the costs and believed it would be unreasonable, hence his choice of redundancy.

42) At the tribunal hearing, the claimant gave evidence that Ms Magee's notes of ICMs did not record all that was said. The notes of the first ICM made no reference to any discussion about him taking the Urswick route to Ulverston on his motorbike, yet this was discussed and he objected to it.

43) The claimant was clear and consistent with his evidence and presented at the hearing as a credible witness. Ms Magee did not give evidence. Therefore, I accept the claimant's version of events.

44) On 15 March 2019 the BRF met and the claimant was provisionally selected for redundancy but only because the Ulverston store was at that time oversubscribed [113]. However, it is recorded that they would not have selected him for redundancy based on his increased journey time, the fact he did not want to use his moped, and because he could access Ulverston by train. Therefore, if more hours became available in Ulverston, he would not be made redundant.

45) At his second ICM on 25 March 2019 with Ms Magee [127], the claimant was informed of this decision and was sent provisional redundancy calculations [144].

46) The third ICM took place on 2 January 2020 with Jason Umpleby, [139]], when the claimant was told that a final decision on redundancy had not been made. He then mentioned for the first time that he had mental health issues and explained his history relating to travelling on public transport. He also questioned some of the travel information that had been recorded. When asked why he had not raised it previously, he said it was because he believed he was being made redundant.

47) Following the third ICM, he wrote to Mr Umpleby on 17 January 2020 saying:

"Further to our conversation on the 2/1/20, I wish to confirm in writing that travelling by public transport will cause me enormous stress and anxiety and, as discussed, my medical history can validate this."

48) At the fourth ICM on 6 February 2020 [148] Ms Magee told the claimant that enough hours had become available at Ulverston for all those who had provisionally been selected for redundancy and he would now be redeployed. He voiced his concerns that this was unreasonable *"due to various reasons inc. Mental Health issues (history involving travelling on Public Transport). Difficult to talk about – dark period in past."*

49) The claimant explained in evidence that he had not raised his mental health problems earlier because there was no need to, as he thought he was being made redundant.

50) He appealed the decision on 11 February 2020 [153] on the basis that redeployment to Ulverston was not reasonable because:

- He was a learner driver and was reluctant to ride his 125cc motorbike on a 60 mph A road. He had recently fallen off his motorbike and broken his elbow and was off work for 12 weeks.

- Travelling and having to rely on public transport caused him severe anxiety and panic attacks. He went on to set out his history of health problems worrying about using public transport and how this caused him to become an alcoholic. Therefore, he said, he had an understandable fear and trepidation of a relapse occurring, if he had to return to using public transport for work.

51) The Appeal Panel referred the matter to Occupation Health (OH) [155] commenting:

- *"William has explained that he would be unable to travel to the new Store using Public Transport as he suffers anxiety when using Public Transport."*

52) The OH report dated 3 March 2020 [165] set out the "Current issues" in which it recorded the claimant's problems with public transport. It also noted:

- *"He tells me he has a scooter, which he uses to travel to his current store; however, he reported only making short journeys and that he would not feel safe using this scooter to make the long journey to the Ulverston store. He spoke about his increasing anxiety over the last 4-6 weeks in regards to his work-related concerns and he disclosed experiencing "dark periods" and night sweats."*

53) The following extracts from OH report's "Opinion and Management Advice" are noteworthy:

- *"it was assessed that William has experienced severe symptoms of anxiety and depression."*

- *"it would appear that he has a long-term mental health condition, of anxiety, which can be exacerbated through travelling by public transport. I am of the opinion that William is at risk of further exacerbation of his symptoms and further deterioration in his mental health should he be required to make the travel to the Ulverston store moving forward. There were no modifications or adjustments identified that would alleviate the risk moving forward and I would recommend that management hold further discussions with William around his options moving forward."*

54) At a fifth ICM, held with Jakki Magee on 27 May 2020, [169] it is recorded that the claimant was told about the Appeal Panel's decision and he was not happy with it.

55) On 11 June he emailed Jason Umpleby and asked for a copy of the original Appeal Outcome [172].

56) On 16 June 2020 the claimant was sent a letter by e-mail from Hannah Kirk-Smith confirming the Appeal Panel's decision [177]. In essence it said that, whilst the Panel acknowledged the claimant's concerns around public transport, his travel time to Ulverston by scooter of between 14-20 minutes over 6.7 miles was within guidance. It referred erroneously to the OH report recommending that *"William should not travel long journeys on his scooter"* and stated that 6.7 miles was reasonable taking into account his concerns.

Grievance

57) On18 June the claimant raised a grievance challenging the decision of the Appeal Panel. [179]. He said that, based on the OH report, Ulverston was not a suitable alternative and it would be unreasonable to enforce the mobility clause.

58) The grievance was heard on 2 July 2020 by Mr Kristian Dear, HR Store Partner, North) [183]. At the hearing the claimant explained that:

- He currently travelled 2 miles along 30mph residential roads. He was now being asked to travel along fast roads, not gritted in Winter, with no white lines. The A590 had lots of lorries travelling at 50+mph. People had said it was dangerous.

- He was just a learner and did not want to put his life at risk and put his mental health at risk. The issue was the danger he would feel; tractors on the road.
- The coast road was 5 miles longer and still a 60mph road which floods and was very windy in the Winter.
- Friends and family and the church said it was too dangerous.
- He was being supported by his GP and Mind in Furness. He did not think they realised how fragile people were.

59) Mr Dear accepted that the journey to Ulverston would be *"a big step"* for the claimant. However, his remit was limited and on 17 July he wrote to the claimant with the outcome, concluding:

- *"As the panel reference the OH report and its findings, I am satisfied on this point that the process used by the appeal in seeking an independent medical opinion and using this to inform the outcome was followed."* [204]

60) The claimant then attempted to appeal, although there was some confusion over the process. On 24 July Joanne Allen wrote to him saying that he had not provided sufficient grounds for the appeal to be accepted. The grievance was closed.

61) The claimant gave evidence at the hearing that he only used his moped/motorbike for the short journey to work along 30 mph residential roads, and that he was nervous and never travelled more than 25 to 27 mph, having had several accidents. He said the A590 was a busy A road, the coastal road was windy and liable to flooding, and the Urswick route consisted of narrow country lanes. The claimant's evidence came across as credible and there was no evidence to the contrary. Therefore I accept what he said in this regard.

62) Following the grievance outcome the redeployment to Ulverston proceeded with the claimant's start date being 29 July 2020. He did not attend for work at Ulverston and was classed as Absent Without Leave. He was warned on 5 August that, if he did not attend work by 10 August, an investigation into his unauthorised absence would commence [236]. He did not attend, the investigation took place, and he was invited to a disciplinary hearing on 18 August, with summary dismissal being a potential outcome [242].

63) On 13 August the claimant resigned [246]. He said that:

- *"For the reasons I've explained numerous times and detailed in the occupational health report, I cannot go to Ulverston. In the circumstances, I have no choice but to resign and consider myself constructively dismissed."*

64) At the tribunal hearing, the claimant was asked in cross-examination whether he had considered changing shift patterns so as to car share with his wife by dropping her off and picking her up from the local Primary School where she worked 9.30am to 4.00pm Monday to Friday. Whilst he said he had not, this had never been suggested to him during consultation, and also his wife used

it for church band practice, transporting a drum kit, teaching dance in the evenings, and assisting the elderly with gardening. I accept his evidence.

65) He was also asked whether he had considered buying a car instead of a motorbike in 2019, or swapping his motorbike for a car. He said that financial constraints prevented this, given his modest income. No evidence to the contrary was adduced and I accept the claimant's submission.

Submissions

66) Closing submissions were made in writing, due to shortness of time at the hearing.

67) The claimant submitted that the respondent exercised the mobility clause unreasonably and was in breach of the implied term of mutual trust and confidence, culminating in the claimant's constructive dismissal.

68) The respondent submitted that it validly exercised the mobility clause and the claimant unreasonably refused the Ulverston role, which was an offer of suitable alternative employment.

Discussion and Conclusions

Constructive dismissal

69) The main issue is whether it was a fundamental breach of contract to redeploy the claimant to Ulverston, given the transport problems raised.

70) The respondent has not pursued any argument relating to the reasonableness of requiring the claimant to use public transport, and so on the evidence before me, I conclude that it would not be feasible for him to do so.

71) The next question is whether it was reasonable to expect the claimant to use his motorbike or a car.

72) Taking the car first, whilst the claimant could drive, his wife used the only car they possessed for work and other activities, involving the transport of bulky items. It was never suggested to him during the consultation process that this was a viable option and it has only arisen during litigation. The respondent never suggested any particular shift pattern that would accommodate the various commitments and I am satisfied that it was not a feasible option.

73) With respect to buying another car, in the absence of evidence to the contrary, I conclude that this was cost prohibitive, and therefore an impractical suggestion.

74) Turning to travel by motorbike, the journey the claimant was being asked to take must be put in context. He was a nervous, learner driver in his mid sixties, who had suffered several moped/motorbike accidents. He only used his moped/motorbike for the short 2.1 mile journey to work along residential roads with 30mph speed limits. The three routes to Ulverston were all

problematic for him. The A590 was a busy A road, the coast road was windy and liable to flood, and the Urswick route was along narrow country lanes.

75) The claimant would not feel safe using any of these routes, and for him, they would pose a danger. The OH report considered him using his scooter, as well as public transport. Whilst it said his anxiety could be exacerbated by the use of public transport, it also talked more generally of anxiety and work-related concerns. It's conclusions were clear that his mental health would deteriorate if he were required to travel to Ulverston. This was not qualified. Reading the report as a whole, I conclude that it was referring to travel generally, and not just travel by public transport.

76) Once the claimant had made known his anxiety and the issues he faced both with public transport and driving his motorbike to Ulverston, the respondent should have reviewed the redeployment decision and considered whether it was the right thing to do. It did not do so. Furthermore, it failed to take proper account of the OH report, and insisted on redeployment.

77) Although the claimant had a contractual mobility clause requiring him to move to another store if required, in his particular circumstances, with his mental health condition and the safety concerns, it was not feasible for him to do so. Consequently, enforcing the mobility clause was completely unreasonable.

78) Accordingly, the respondent had no reasonable and proper cause for enforcing the mobility clause. Doing so was a fundamental breach of the implied term of trust and confidence, entitling the claimant to treat the contract as at an end. He did not affirm the contract and resigned without delay in response to the breach. Consequently, his claim for constructive dismissal is well-founded and succeeds.

Wrongful dismissal

79) The claimant resigned as a consequence of the fundamental breach of the implied term of trust and confidence. Therefore, his claim is well-founded and he is entitled to notice pay for his notice period.

Polkey/Contributory Fault

80) Had the respondent not required the claimant's redeployment to Ulverston, it would have dismissed him on the grounds of redundancy. Therefore, his compensatory award will be limited to what he would have received had the respondent made him redundant, after giving him proper notice of redundancy.

81) The claimant was not at fault in the way he behaved and there should be no reduction in compensation for blameworthy behaviour.

Loss of statutory rights

82) As the claimant would have been made redundant in any event, he has not suffered any loss of statutory rights and no compensation is awarded in this regard.

Employment Judge Liz Ord

Date 1 August 2022

JUDGMENT SENT TO THE PARTIES ON

4 August 2022

FOR THE TRIBUNAL OFFICE

Notes

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