

EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Ingle-Smith

V

**Supaman Limited t/a Oliver
Brown**

Heard at: London Central

On: 8 and 9 November 2022

Before: Employment Judge Joffe

Representation

For the Claimant: In person

For the Respondent: Mr Chehal, employment consultant

RESERVED JUDGMENT

1. The respondent constructively unfairly dismissed the claimant, contrary to Sections 94 and 98 Employment Rights Act 1996.
2. There is a 25% chance the claimant would have been fairly dismissed had he not resigned.
3. The claimant's contribution to his dismissal was such that it is just and equitable to reduce both the compensatory and basic awards by 75%.

REASONS

Claims and issues

1. The issues were discussed and agreed at a case management preliminary hearing before Employment Judge Connolly on 3 June 2022 and were as follows:

Unfair dismissal

- 1.1 Was the claimant dismissed?
 - 1.2 Did the respondent do the following things:
 - 1.2.1 Did Mr Kristian Robson attempt to physically assault the claimant?
 - 1.2.2 Did Mr Kristian Robson threaten the claimant by saying:
 - 1.2.2.1 "I will fucking shoot you"; and
 - 1.2.2.2 "I will beat the shit out of you"?
 - 1.3 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 1.3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.3.2 whether it had reasonable and proper cause for doing so.
 - 1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
 - 1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
 - 1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
 - 1.7 what was the reason or principal reason for dismissal?
 - 1.8 Was it a potentially fair reason?
 - 1.9 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
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2. Remedy for unfair dismissal
 - 2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.1.1 What financial losses has the dismissal caused the claimant?
 - 2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 2.1.3 If not, for what period of loss should the claimant be compensated?

- 2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 2.1.5 If so, should the claimant's compensation be reduced? By how much?
 - 2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 2.1.7 Did the claimant unreasonably fail to comply with it by failing to utilise the respondent's grievance process before he resigned?
 - 2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 2.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - 2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 2.1.11 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?
- 2.2 What basic award is payable to the claimant, if any?
- 2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings of fact

3. I was provided with a bundle running to 122 pages. The claimant gave evidence on his own behalf and produced a witness statement from Mr A Courtney, formerly the store manager of the respondent's Jermyn Street store. Mr Courtney has since moved to Spain and the claimant said that is why he was not available to give evidence.
4. For the respondent, I heard from Mr K Robson, the owner and managing director of the respondent, Mr R Dymock-Maunsell, a management consultant who carries out consultancy work for the respondent, Mr H Stanley, a restaurateur and client of the respondent, Mr R Fuller, retail general manager for the respondent, and Mr S Bhattarai, director of operations at a restaurant called Isabel Mayfair.
5. I was also provided with a section of CCTV footage from Isabel Mayfair on the evening of 3 November 2021 and I watched that footage a number of times.
6. The claimant worked for the respondent as an assistant manager from 1 June 2018. The respondent is a tailoring business which trades under the name of Oliver Brown, with a shop in Lower Sloane Street and one in Jermyn Street.
7. The events with which I am concerned all took place on 3 November 2021; this was the date of the launch party for the new Jermyn Street store. The party was held in the evening at the store and afterwards Mr Robson had

arranged a private dinner at Isabel Mayfair for business associates and friends. Some models and social media influencers had also been invited, and some of these 'VIPs' were paid to attend.

8. I heard some evidence about the events earlier on that day which did not seem to me to be material to the issues I had to decide save to say that the claimant had had a busy day and only a short break and not much time to eat anything.
9. Staff including the claimant were involved in setting up the party and serving drinks.
10. Mr Fuller said that he told staff that Mr Robson did not want them to drink and the claimant replied: 'Fuck that, I am fucking drinking'. He said that the claimant appointed himself chief barman and was helping himself to drinks as the evening went on. He said that the claimant was very loud and was serving drinks to customers he liked.
11. There was an email dated 16 November 2021 in the bundle from a Ms Goodley who did PR for the respondent. She described the claimant as having been 'drunk, loud and obnoxious' at the launch party.
12. The claimant said that he only drank a quarter of a Negroni to test the mixture and otherwise did not drink. He said that he was very busy serving drinks and was not inebriated. He said that Mr Dymock-Maunsell told him to stop serving Mr Robson as the latter was visibly inebriated and he did not want him to embarrass himself. Mr Dymock-Maunsell denied that this conversation took place and Mr Robson denied that he was inebriated. Mr Dymock-Maunsell said that Mr Robson was hosting and speaking with the influencers and was nervous and on edge.
13. The launch party concluded about 8:45 and the staff were tidying up and restoring the shop. The claimant said that he was chatting to a customer named Henry who had stayed on. He had a good rapport with Henry and he said Henry said that Mr Robson was hosting an after party and invited the claimant to join him. The claimant said he initially declined the offer as he had had a long day with only a short break but that Henry was insistent so he told Mr Courtney that he was going to accompany Henry to Isabel Mayfair to keep him happy.
14. The claimant said that when he and Henry arrived at the restaurant, they saw Mr Stanley outside having a cigarette. He said that Mr Stanley warmly greeted the claimant and Henry and asked if they would like to join him inside.
15. Mr Stanley in his witness statement said that he was outside having a cigarette but did not know who Henry was and that he noticed the claimant

tailgating him into the restaurant when he returned inside. In oral evidence he accepted that he did have a conversation with the claimant outside the restaurant but could not remember much about it.

16. The claimant said that Mr Stanley escorted the claimant and Henry to a table where the claimant sat down with Henry and Mr Stanley. Mr Robson was at the other end of the table with his wife and Mr Dymock-Maunsell and the claimant said that Mr Robson did not notice the claimant at first. He said that Mr Stanley passed him a plate of food and he gratefully ate from the plate. Mr Stanley denied providing the claimant with a plate of food. The witnesses said that there were sharing plates of food on the table and that guests had individual plates to help themselves from the sharing plates.
17. A short time after he arrived, the claimant said he made eye contact with Mr Robson who shouted over: 'What are you doing here?' and he replied that Henry had invited him. He said that Mr Robson replied: 'Get downstairs immediately' and that he said: 'Please don't shout at me like that in front of the guests'.
18. The claimant said that Mr Robson then became enraged and came towards him with what he perceived to be threatening body language. He said that Mr Dymock-Maunsell followed Mr Robson around to the claimant's side of the table and stood beside him. Mr Robson stood opposite the claimant and shouted: 'If you do not go downstairs now I will beat the shit out of you.' The claimant said: 'I would like to see you try'.
19. The claimant said that Mr Robson then lunged at him attempting to punch him and he managed to swerve backwards to avoid being hit. He said that Mr Dymock-Maunsell managed to jump in between them and that Mr Robson was continuing to try to punch him and shouting: 'I will beat the shit out of you, you little cunt' and 'I will fucking shoot you'. He said that at this point Mr Bhattarai and security staff became involved and suggested it would be best if the claimant left.
20. The claimant said that Mr Bhattarai then apologised to him and told him he was welcome back at any other time.
21. Mr Robson's account is that he was in the bathroom when the claimant arrived. He got back to his table and noticed the claimant was there and helping himself to food and drink. He said that he approached the claimant and said 'please leave this is a private party' and that no Oliver Brown staff were invited. He said that the claimant ignored him and carried on eating and drinking and said: 'Fuck off, you haven't fed me in 14 fucking hours'.
22. The claimant had emphasised in his own evidence how hungry he was and how he had not eaten for a long time, and he accepted in response to

questions that he probably had said something to Mr Robson about being hungry but would not have used such 'coarse' language.

23. Mr Robson said that he was scared as the claimant was so drunk and abusive, so he contacted security, who removed him.
24. Mr Robson said that the claimant was screaming abuse when removed by security, Mr Robson denied trying to punch the claimant, saying he would shoot the claimant and saying that he would 'beat the shit out of' the claimant.
25. Mr Robson in oral evidence explained how he felt the claimant was ruining what was an important evening for his family and business. He had been 'incredibly upset'.
26. Mr Bhattarai in evidence denied apologising to the claimant. He said that if someone was causing problems, he would ask that person to leave and would have no reason to apologise in those circumstances.
27. Mr Dymock-Maunsell's evidence was that he was not worried about the amount of alcohol being drunk by Mr Robson although he was concerned about the staff drinking at the launch party; they were getting quite vocal and unprofessional. I accepted that evidence. Mr Robson had explained how important the evening was for his business and it seemed to me unlikely he would have become very inebriated prior to the dinner involving 'VIPs'.
28. At the dinner Mr Dymock-Maunsell recalled the claimant arriving. He was surprised to see him as he did not think he was invited. The claimant sat down at a space vacated by a guest who was outside smoking or chatting and started to help himself to food and drink. Mr Robson returned and told the claimant that he was not invited and he needed to leave. He said that the claimant was very drunk, loud and aggressive. His evidence of the claimant being drunk was that he was slurring and sounded and smelled drunk. He said that the claimant refused to leave and Mr Robson continued to ask him to leave. This went on for several minutes until security became involved and managed to escort the claimant out. He did not have to insert himself between Mr Robson and the claimant. He recalled Mr Robson going to the claimant's end of the table. He said Mr Robson was pretty restrained. There were some important guests, the influencers. He said that Mr Robson managed to keep his cool overall; the situation would have been more embarrassing if he had said the things the claimant had suggested in front of the influencers, some of whom had been paid to attend.
29. Mr Dymock-Maunsell said he was near enough to hear what was said by Mr Robson and did not hear him making any threats.

30. Mr Stanley was seated near to the claimant on the opposite side of the table. He said that the claimant was incredibly drunk. In oral evidence he said that impression was not connected with any particular behaviour of the claimant's but from his experience as a restaurateur. The only physical sign he pointed to was the claimant having glassy eyes.
31. Mr Stanley said that Mr Robson did not threaten the claimant but asked him to leave several times, The claimant was eating other people's food and drinking their wine. Mr Robson asked nicely and the claimant stood his ground, downing drinks whilst talking.
32. Mr Stanley had no recollection of Mr Robson coming to the claimant's end of the table and speaking to him there. He said that he was speaking to Mr Robson's wife and it was pretty loud in the restaurant. He said that he did not see restaurant security staff become involved.
33. The grounds of resistance said that the claimant had been shouting, amongst other things, 'I will never fucking work for you again' as he left but that did not appear in any of the witness statements. The grounds of resistance also stated that the claimant was eating food with his hands, but none of the witnesses gave evidence to that effect

CCTV

34. The CCTV footage captures several minutes starting at a point when the claimant was already seated at a long table and continuing until he leaves the restaurant. When the footage starts the claimant can be seen eating with cutlery and drinking. Mr Robson is on the opposite side of the table at the other end; he appears to notice the claimant and speaks to him across the table. The claimant replies and continues to eat and drink. Mr Robson walks over and removes the claimant's plate; the claimant's fork is still in his hand. Mr Robson starts to wave his hands in a way which suggests that he is gesturing for the claimant to leave. The two people on the edge of the banquette the claimant is sitting on appear to get up in order to allow the claimant to leave; he does not do so.
35. Mr Robson leans towards the claimant at this point with his hand out; this looks like gesturing rather than threatening to physically strike the claimant. The CCTV does not show anything which appears from the angle the camera captures to be a punch or an attempt at any kind of assault. Mr Dymock-Maunsell does not appear to be intervening to prevent any assault although he is also standing near Mr Robson.
36. Mr Robson then withdraws and appears to speak with restaurant staff. He then seems to be remonstrating further with the claimant before returning to his seat. Mr Dymock-Maunsell then sits next to the claimant and puts his arm

around him. The claimant drinks from a wine glass. Mr Robson speaks further to the claimant from his seat and the claimant responds to him. Mr Dymock-Maunsell gets up. Mr Robson gets up and sits down again several times before restaurant staff come and speak to the claimant and after some discussion the claimant leaves.

37. The CCTV footage is from some distance and is not very clear. The claimant cannot be seen eating with his hands in the footage. He can be seen eating with a fork and drinking from a wine glass or glasses. There are opportunities for the claimant to leave, after the exchange starts, when Mr Robson is seated. There are quite a few exchanges between the claimant and Mr Robson.
38. The claimant asked whether there was further CCTV footage, showing what happened at the door of the restaurant for example, but the evidence of the respondent was that the restaurant did not retain any of the other CCTV footage as it was not requested within the retention period.
39. Neither side's case is entirely consistent with the CCTV footage. The claimant's witness statement exaggerates the level of physical aggression by Mr Robson. In oral evidence, the claimant said that Mr Robson's body language was aggressive and in the sequence where Mr Robson's hand comes towards him he was unsure whether Mr Robson was going to slap or punch him. He said his adrenaline was going and he swerved backwards. He said that he thought that Mr Dymock-Maunsell was standing in the way to stop him from being attacked.
40. Mr Robson made no reference in his statement to removing the plate from the claimant. Mr Stanley's evidence that he was not aware of Mr Robson coming to that end of the table and speaking to the claimant was difficult to accept in circumstances where Mr Stanley had taken notice of the beginnings of what was a relatively short encounter. He said he had been able to hear those parts of the conversation between the claimant but did not hear anything which was said when Mr Robson came down to the other end of the table and was nearer to Mr Stanley. Various witnesses said that there was a significant level of background noise. The claimant said that Mr Robson shouted his threats and everyone would have heard them.
41. Mr Bhattarai's evidence was that when he saw the claimant, the claimant was being loud and eating from someone else's plate. That person was upset.
42. Mr Ben Dhiab, the manager on duty, asked Mr Robson who the claimant was as he was being loud and forceful. Mr Robson told Mr Ben Dhiab the claimant's name and said that he wasn't invited to the dinner. Mr Ben Dhiab therefore approached the claimant and asked him to leave. The claimant refused to leave and ate from the plates of other guests. According to Mr

Bhattarai, the claimant spoke 'rudely and violently'. He could not relate anything specific the claimant said but said that he was swearing. He was making a lot of noise and could be heard by people at the surrounding tables.

43. Mr Bhattarai said that he had not recognised the claimant although he accepted that the claimant may have done his uniform fittings. That had happened once or twice in the past four to five years.
44. Mr Fuller was not at the dinner. He gave evidence that he never saw Mr Robson threaten anyone with violence, He did not accept when it was put to him by the claimant that Mr Robson gave new staff a talk when they joined the respondent in which he said that Mr Robson was erratic. He said that he did tell new staff that Mr Robson had a direct management style. He had not seen Mr Robson become aggressive. In answer to my question, he said that by a direct management style, he did not mean shouting.
45. Mr Fuller denied that he had told the claimant that Mr Robson's behaviour could be erratic and disturbing and denied that he told the claimant a story about a previous employee who had walked out of the business saying that he could not work with Mr Robson.
46. The claimant said that after the incident he returned to the Jermyn Street store and told Mr Courtney and the other staff there what had happened. The team had hugged him.
47. Mr Courtney invited the remaining staff to the pub for a drink. He said in his witness statement that Mr Fuller then received a call from Henry and said that Henry had called to pass on his apologies for what had happened. Mr Fuller said that Henry had worked at the shop for perhaps three months and he was not sure if he had Henry's phone number. He did not recall receiving a call from Henry.
48. The claimant and Mr Fuller shared an Uber to Surbiton where they both lived.
49. Mr Fuller said that the claimant returned to the shop at about 10:30 pm and banged on the doors. The claimant said that he had been at the after party. Mr Fuller said that he remarked that it was a private party and asked the claimant how he got in. The claimant said that he had been invited by Mr Stanley but Mr Robson had thrown him out and threatened to kill and shoot him. Mr Fuller said that no one took notice of what the claimant was saying as he was very drunk.
50. Mr Fuller said that during the cab ride home, the claimant continued to talk about the threats and said that he could not work with Mr Robson and the brand. He said that he could not return to work as he felt threatened and

angry about the situation. Mr Fuller says he tried to persuade him to reconsider.

51. The following day, Mr Robson said he spoke to Henry about the party. It appeared that Mr Robson spoke to Henry on more than one occasion about the events of that evening, He said that Henry denied inviting the claimant to the party. Henry did not attend to give evidence.
52. I accepted the claimant's evidence that he was encouraged to come along to the party by Henry. That is consistent with the fact that Mr Stanley saw them arriving together. It was consistent with the evidence in Mr Courtney's statement which Mr Fuller was unable to recall about Henry telephoning to express concern. It was open to the respondent to call Henry to deny that this is what had occurred but he was not called.
53. I accepted the evidence of Mr Fuller in particular that the claimant became inebriated during the launch party in the shop. That was consistent with the observations of other witnesses. At the dinner the claimant can be seen on the CCTV footage appearing to knock back at least one glass of wine.
54. I concluded that the claimant sat at the place of a guest who had temporarily left his or her seat and ate from a plate of food that was on the table which would have been the plate of food taken by that guest or another guest from the sharing plates in the middle of the table.
55. When Mr Robson became aware of the claimant's presence, he first attempted to deal with the situation by telling the claimant to leave whilst remaining in his own seat. I accepted that the claimant responded by refusing to leave and complaining in forthright terms about not having been fed.
56. Mr Robson then went to the claimant's end of the table and removed the plate of food the claimant was eating from. He was clearly angry and upset at this point and the claimant was intransigent about leaving even after being asked a number of times. I concluded that both the claimant and Mr Robson exaggerated the fear they said they felt about each other but I concluded both were upset by the encounter.
57. I accepted that Mr Robson had made the threatening remarks reported by the claimant, probably during the part of the encounter where he had come down to the claimant's end of the table and was leaning towards him, the other occupants of the banquette nearer to the end of the banquette having exited the banquette.
58. The fact that the claimant made contemporaneous complaints about threats was an important factor in my conclusions. Mr Robson's attitude to the claimant at the hearing suggested an implicit acceptance that there was fault

on both sides. It seemed to me that there had been an opportunity for Mr Robson to make the threats in a way which was not necessarily audible to the VIPs in the noisy restaurant at the point when he was nearest to the claimant. This would also have been a point when Mr Robson was particularly upset and frustrated as his efforts to get the claimant to leave had not succeeded. I considered that Mr Stanley may well have heard more than he wanted to tell the Tribunal about this part of the encounter, hence his denial that he was aware of Mr Robson coming to that end of the table.

59. I accepted the claimant's account of the threats although I rejected his account that Mr Robson had been physically threatening, an account which was not consistent with the CCTV footage. It seemed to me that in his inebriated state the claimant may have felt somewhat fearful that Mr Robson would engage with him physically. I was not able to conclude that he had consciously misrepresented the encounter to mislead the Tribunal as opposed to having come away from the encounter with an impression which was not justified by what Mr Robson can actually be seen to have done on the footage.
60. The claimant said in evidence that he did not just leave when requested to do so because he was frightened to stand up when Mr Robson was so angry. He thought it would seem confrontational if he stood up and he wanted the 'anger and vitriol' to have a chance to subside. I did consider that the claimant's evidence on this point was misleading. It is clear from the CCTV footage that he had the opportunity to leave at times when Mr Robson was seated. Instead of leaving he makes the obviously provocative remark about not having been fed and continues to eat and drink. If anything his behaviour appears defiant at that point rather than intimidated.
61. On 4 November 2021, the claimant sent a resignation email to Mr Fuller first thing in the morning: to say that 'following last night's threats of violence against me by Kristian, I no longer feel safe attending my place of work. Considering Kristian's threats to 'shoot me' and 'beat the shit out of me' and being in the knowledge of his ownership of a licensed firearm, I am truly fearful of myself being physically present at work... My attendance at Isabel's restaurant in Mayfair for Kristian's public relations event was at the insistence of one of Kristian's friends.'
62. Mr Fuller then took some advice from the respondent's HR service, Peninsula, and on that advice collected some statements from witnesses to the events. On 11 November 2021, the respondent accepted the claimant's resignation.
63. Mr Robson's evidence was that trust and confidence had been damaged and that there would have been a disciplinary process if the claimant had not resigned and had attended work. His evidence to the Tribunal was that that would not necessarily have led to the claimant's dismissal.

64. The claimant's further email of 11 November 2021 said that Mr Robson had attempted to physically assault him and had to be held back by Mr Dymock-Maunsell to prevent the threatened attack. He said that staff past and present have contacted him offering support and offering a wealth of evidence about how they too had been victims of Mr Robson's bullying tactics and psychological abuse.
65. The claimant told the Tribunal that he feared violence from Mr Robson. He said that he was aware that Mr Robson owned a gun for recreational purposes and that he had been told by Mr Fuller that Mr Robson had punched someone at a trade event. He had heard him on the phone verbally abusing people, for example an electrician who had been attending his house.
66. I was not persuaded that the claimant genuinely feared a physical attack by Mr Robson if he attended work. This was partly because I considered that the claimant had significantly exaggerated the extent to which he had been frightened by Mr Robson on the night. His behaviour was inconsistent with his account. Furthermore, it did not seem logical for him to extrapolate from some threats made in a heated moment to likely consequences in the workplace.
67. It seemed to me that a significant source of the claimant's outrage was the fact that he felt disrespected and humiliated by the events which had occurred. He felt that he had been invited to the event and was entitled to be there. The removal of the plate and being told to leave in front of people he knew and the 'VIPs' would have been a significant affront to his *amour propre*.

Law

Constructive dismissal

68. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer 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".
69. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.
70. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal (Nottingham County Council v Mickle and Abbey Cars Ltd v Ford EAT 0472/07). In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an

employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons

71. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and his employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.
72. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (Woods v Car Services (Peterborough) Limited [1981] ICR 666). It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer: Malik v BCCI [1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.
73. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract (Morrow v Safeway Stores [2002] IRLR 9 and Ahmed v Amnesty International [2009] ICR 1450).
74. It is of course somewhat artificial to require an employer who denies having dismissed an employee to show a reason for the dismissal. The Court of Appeal addressed this problem in Berriman v Delabole Slate Limited [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign.
75. However even where there is a potentially fair reason for dismissal, the question is whether in the circumstances the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. In practice, what this means in a constructive dismissal case is that we should ask ourselves whether the employer's reason for committing the fundamental breach of contract was, in the circumstances, sufficient to justify that breach.
76. An employee who has himself already committed a repudiatory breach of contract may still be constructively dismissed. As HHJ Burke said in Atkinson v Community Gateway Association [2014] IRLR 834, [2015] ICR 1:
"... the obligation of trust and confidence which lies on each party to a contract of employment are not suspended or put in abeyance because one party has broken that obligation. If one party commits a fundamental or repudiatory breach of that obligation and the other does not accept that breach as bringing the contract to an end, whether because he does not know about the breach or otherwise, the contract continues. We repeat the trite observation that an

unaccepted repudiation is a “thing writ in water”. If the party which had the right to bring the contract to an end did not do so (whether or not he knew of that right) and was himself in fundamental breach of contract, simultaneously or subsequently, it would then be open to the originally offending party to accept that repudiation and bring the contract to an end. If the originally offending party was an employee who subsequently brought a constructive dismissal claim based on the employers' subsequent breach, the Employment Tribunal would inevitably be invited to and would have to consider reducing compensation, if the dismissal were shown to be unfair, by 100% or by a lesser proportion as appropriate if it were established that, because of the employee's original breach he could and, if the employers had known about it, would have been fairly dismissed in any event."

Polkey reduction

77. Section 123(1) ERA provides that

‘...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.’

78. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

79. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

- in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;
- if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);
- there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

- however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;
- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

80. As Elias J said in Software 2000:

‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.’

Conclusions

Issue: Did the respondent do the following things:

Did Mr Kristian Robson attempt to physically assault the claimant?

Did Mr Kristian Robson threaten the claimant by saying:

“I will fucking shoot you”; and

“I will beat the shit out of you”?

81. I concluded that there was no attempt by Mr Robson to physically assault the claimant but that the threats were made as alleged.

82. I concluded that the claimant believed he was entitled to be at the dinner because he was invited along by Henry, whom he knew to be a client of the

respondent. In a state of inebriation he sat down and ate from a plate which was on the table and drank wine previously poured. When asked by Mr Robson to leave he defiantly stayed and continued to eat and drink. Ultimately and under significant provocation, Mr Robson threatened the claimant, although I concluded it was unlikely that the claimant believed the threats would be carried out, certainly once the immediate moment of tension had passed.

83. The claimant responded to the threats by saying he would not work for Mr Robson again. I concluded that they played a material role in his decision to resign although it seemed to me that there were other matters also in play such as the fact that the whole incident was humiliating to him, as he also made clear in his evidence. He said that he saw himself as part of the Oliver Brown 'family' and many of the people at the dinner were known to him.
84. I raised with the parties the issues of whether his attendance at the dinner could be considered to be in the course of the claimant's employment and whether it mattered whether it was in a case of this sort, ie a constructive dismissal case.
85. Ultimately I considered that I would have concluded that the dinner occurred in the course of the claimant's employment had I needed to decide whether the respondent was vicariously liable to the claimant for wrongs which occurred during the dinner. This was because I accepted that the claimant was invited by a client and believed he was legitimately at the event in relation to his work, that the dinner was effectively an extension of the launch party. But in any event, it seemed to me that it was not necessary that the conduct had occurred during the course of employment for there to have been a breach of the implied term of trust and confidence. The implied term looks to the relationship between parties who have to work together. That relationship can be damaged or destroyed by matters outside of what occurs in the course of employment. To take an extreme case, if an employee went round to his employer's house after work and set it on fire, it would be difficult to say that the relationship of trust and confidence had not been destroyed. Similarly in this case, a threat by an employer to an employee is likely to destroy the relationship. This was also a threat not from a colleague but from the owner of the business.

Issue: Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

whether it had reasonable and proper cause for doing so.

86. By the point when the threat was issued, the claimant may himself have been in repudiatory breach of contract, having refused to leave and behaved defiantly to Mr Robson. However any such breach had not been accepted by the time the threats were made.

87. Did the threats themselves constitute a repudiatory breach of contract by the respondent? I concluded that they did. It may be that there could be a context (an unusual one) in which threats to kill an employee, delivered in anger would not be likely to seriously damage or destroy the relationship of trust and confidence but these did not seem to me to be such circumstances.

88. Mr Robson was sorely provoked but that is not the same thing as having reasonable and proper cause for issuing threats. He had cause to firmly require the claimant to leave and to involve restaurant security in his removal but a threat to kill self-evidently is not a reasonable and proper way to persuade a person to leave premises.

Issue: Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

89. A breach of the implied term of trust and confidence is necessarily a fundamental breach of contract.

Issue: Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

90. The claimant immediately responded to the threats by saying he would not work for Mr Robson again. I concluded that they played a material role in his decision to resign although it seemed to me that there were other matters also in play such as the fact that the whole incident was humiliating to him. The role played by the breach was sufficient in law for this to be a constructive dismissal provided the other elements of the test are satisfied.

Issue: Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

91. I heard no submissions on this point and it was clear on the evidence that the claimant had done nothing to keep the contract alive and had resigned promptly.

Issue: What was the reason or principal reason for dismissal?

Was it a potentially fair reason?

92. There was no real suggestion by the respondent that there was a potentially fair reason for the dismissal. In essence it would have to have been argued that there was a fair reason for Mr Robson making threats to kill the claimant.

Issue: Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

93. This issue does not arise.

94. It follows from the conclusions above that the claimant was constructively dismissed and his dismissal was unfair.

Issues relating to remedy

Issue: Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

95. Would the claimant have been dismissed fairly for his misconduct in refusing to leave the dinner and /or his other behaviour at the dinner?

96. It seemed to me that there was a low but not negligible likelihood of this based on the following factors:

- Mr Fuller had attempted to calm him down after the incident and persuade him not to resign;
- The respondent's initial response to the resignation was not to raise the claimant's own wrongdoing;
- Mr Robson suggested at the hearing that the relationship might well have continued;
- A fair investigation would have uncovered the fact that the claimant had reason to believe it was acceptable for him to attend as he had been invited along by a client.

97. I concluded that there was a 25% chance that the claimant would have been fairly dismissed.

Issue: If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

98. I concluded that the claimant's conduct in refusing to leave the dinner when asked but instead behaving defiantly and continuing to eat food and drink wine provided for guests was blameworthy. Had the claimant not already been inebriated when he arrived, he might have realised sooner that the dinner was invitation only and that he was sitting at someone else's place and consuming their food and drink. I concluded that it was his continued refusal to leave which provoked an inappropriate response from Mr Robson but the provocation was significant. I assessed the relative levels of culpability as

75% for the claimant and 25% for the respondent. Mr Robson's behaviour was poor, but as he explained to the Tribunal it was an important night for him and he felt the claimant was wrecking it.

Issues: Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.1.7 Did the claimant unreasonably fail to comply with it by failing to utilise the respondent's grievance process before he resigned?

2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

99. An employee whose contract has been fundamentally breached by his employer is not obliged to provide his employer with an opportunity to repair the breach. I concluded that in those circumstances, it was not a breach of the ACAS Code for the claimant not to commence a grievance, and, if I am wrong about that, it was certainly not unreasonable for him not to do so. There was therefore no basis for making a reduction to the compensatory award under this head.
100. The claimant put in a schedule of loss which showed he had lost eight weeks of earnings and pension contributions. He also claimed £450 for loss of statutory rights, £1500 for his annual bonus and £45 for travel costs to get to interviews. The total compensation he claimed was £5688.52.
101. That figure has to be reduced first by 25% for *Polkey* and then by 75% for contribution. That would leave a compensatory award of £1066.60.
102. The claimant was on a gross weekly salary of £615.38. The weekly maximum for the calculation of a basic award at the time of the claimant's dismissal was £544. He had three full years of employment. The unreduced basic award would be £1642. After a reduction of 75% for contribution the basic award is £410.50.
103. The respondent did not have the opportunity to address me on the figures put forward by the claimant because I had to reserve the decision on liability. The parties must write to the Tribunal for my attention within two weeks of the date this Judgment is sent to them indicating whether they are satisfied with the calculations or whether they wish to contest them and if so, on what basis. I will then either give a remedy Judgment for the above amount or directions for a short remedy hearing.

Employment Judge Joffe

7 December 2022

Sent to the parties on:

07/12/2022

For the Tribunal Office: