



EMPLOYMENT TRIBUNALS

Claimant: Mr J Lewis

Respondent: SGC Holdings trading as SGC Security

Heard at: Cardiff by video **On:** 10th February 2022

Before: Employment Judge C Butcher

Representation

For the Claimant: Mr Winrow
Respondent: Mr Bradley

JUDGMENT

The claim of the Claimant, Mr Lewis is well founded and upheld.

The Respondent is ordered to pay the Claimant damages for breach of contract in the sum of £7497 gross. The Claimant is responsible for any income tax or employee national insurance contributions that may be due on the sum awarded.

REASONS

1. The Claimant was employed as Operations Manager from 27/4/20 by Samson Security. The contract was taken over by SGC Holdings trading as SGC Security (the Respondent) on 1/4/21.

2. The Claimant resigned his position on 15/4/21 and issued an ET1 claim against the Respondent on the basis that he had been constructively wrongfully dismissed. In response, the Respondent opposed the claim as the Claimant had resigned without notice during a redundancy consultation.

3. The issues before the Tribunal were:

- (a) Did the Respondent breach the Claimant's contract of employment?
- (b) If so, was that breach fundamental?
- (c) If so, did the Claimant resign in response to that breach or for some other reason?
- (d) If so, the Claimant nevertheless waive or affirm the breach through his words or conduct.

The hearing

4. I was presented with a bundle of documents amounting to 98 pages. I also heard evidence from the Claimant and from Mr Bradley on behalf of SGC Security. Mr McNulty, the Head of Business Development for SGC Security had filed a witness statement but did not attend the hearing. After making enquiries as to the reason why he had not attended, Mr Bradley had no explanation and was not certain that Mr McNulty was still with the company.

5. I was satisfied that Mr McNulty had notice of the hearing and in accordance with Rules 2 and 47 of ET Tribunal Rules, proceeded with the hearing.

The law

6. An employee who terminates the contract of employment may claim to have been dismissed by the employer if the circumstances are such that he is entitled to terminate it by reason of the employer's conduct. This concept is known as constructive dismissal. The entitlement to terminate must be a contractual element. The leading case on whether there has been a constructive dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] IRIR 27 (CA)** and there are four tests to be satisfied, which are:

- i) Did the employer breach the employee's contract of employment?
- ii) If so, was that breach fundamental?
- iii) If so, did the employee resign in response to that breach or for some other reason?
- iv) If so, did the employee nevertheless affirm or waive the breach through his words or actions?

In this case, the Claimant contends that he was wrongfully constructively dismissed because he resigned in response to a breach of the implied term of mutual trust and confidence. The definition of that term was set out in the case of **Malik & another v BCCI [1997] IRIR 462**. It is an implied term of the contract of employment that "the employer shall not, without reasonable and proper cause, conduct itself in a way which is calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence with the employee". A breach of this term is always a fundamental breach and satisfies the first and second test in the **Western Excavating** case.

7. Wrongful dismissal is usually pursued in respect of notice pay. If the claim is for notice pay, it must first be proven that the employee had a contractual entitlement to notice of the termination of their employment. Secondly, if the employee is dismissed without notice, a breach of contract is in principle established. The assessment of damages for wrongful dismissal is by way of damages for the remuneration that the employee has been prevented from earning by the wrongful dismissal (**Eastwood v Magnox Electric plc: McCabe v Cornwall CC [2005] 1 AC 503**). Typically, the amount of damages is assessed as reflecting the notice

period to which the employee was entitled to receive. In this case, notice pay is all that is claimed.

8. The Claimant's evidence was that he had learned of the takeover by SGC Security indirectly through colleagues, which was to take effect on 1/4/21. The Claimant contacted Mr McNulty through emails enquiring who to contact in relation to the transfer and to clarify his position. He was informed in response that his employment would not be transferred under the TUPE arrangement as SGC Security already had a team in place. The Claimant emailed his solicitor on 23/3/21 (page 45) saying "By their emails and the way they are treating me they are making me seriously unwell...they are stressing me out". The Claimant's solicitor wrote to Mr McNulty to assert that the Claimant was eligible for transfer. During a subsequent telephone call to the Claimant, Mr McNulty again refused the suggestion of a transfer during which the Claimant felt he was being bullied, with Mr McNulty telling him that he would not allow the Claimant within 100 yards of any of his sites.

9. The Claimant received an email from Mr Bradley, HR Consultant dated 1/4/21 (page 55) informing him that SGC Security would "embrace his role as a transferring one" but they would need to begin a redundancy consultation straight away and invited him to a consultation meeting. During the meeting on 6/4/21, the Claimant was informed that he could be deployed to a site in Twickenham (the Claimant residing in North Wales).

10. On 15/4/21, the Claimant received an email from Peter Horner on behalf of the Respondent, offering him shifts at the Deeside site as a security guard. The Claimant would be working in the same position as those he had formerly managed as Operations Manager. Further short notice individual shifts were offered to the Claimant in Blackpool and Clifton. The Claimant felt undermined and that this was the final straw. He resigned by way of mail on 15/4/21.

11. On behalf of the Respondent, Mr Bradley's evidence was that the reference to Twickenham was taken out of context and that he had only been referring to the wide range of sites that the Respondent covered. He accepted that the situation relating to the transfer was unfortunate but that this had been as a result of the behaviour of the outgoing company. The ELI list for transferring employees was only received on 23/3/21.

12. When questioned about the content and tone of the emails sent to the Claimant by Mr McNulty, Mr Bradley said he "could not defend the indefensible" and that "the emails speak for themselves". He did not, however, accept that the Claimant should have felt confused about his position and should not have resigned without notice. In his view, the Claimant should have issued a grievance rather than resign.

13. Mr Bradley acknowledged that whilst the Claimant was of "officer material", the email offering of a position of security guard also confirmed that his contracted salary would have been the same. Mr Bradley did not take issue with the notice period of 3 months which was contained in the Claimant's terms of employment (p34), nor his salary.

Findings

14. The Claimant's terms of employment detail his salary and contractual notice period of 3 months (p36), which was not disputed. At p54 of the bundle, the

Claimant has provided a wage slip dated 31.3.21 showing his gross monthly pay including bonus payment of £2499.33. I accept this reflects the salary of the Claimant.

15. The Claimant resignation followed a series of communication during which he was repeatedly refused to be considered for a transfer following the takeover of the contract by SGC Security. Due to the nonattendance of Mr McNulty, whilst I considered his statement within the bundle, it was not possible to obtain direct evidence from him in relation to his behaviour towards the Claimant. I accept the evidence of Mr Bradley that the emails speak for themselves.

16. The Claimant had a reasonable expectation that he should have been informed directly about his position and the change of contract provider. The manner in which the Claimant was repeatedly refused to be considered for transfer was, in my view, unreasonable and this was compounded by Mr McNulty informing the Claimant that he would not be allowed within 100 yards of any site for which SGC Security was responsible.

17. The email from Mr Bradley to the Claimant dated 1/4/21 where transfer was acknowledged and the redundancy consultation began was sent on the day when the contract takeover took place. Whilst I accept Mr Bradley's evidence about his subsequent comments to the Claimant about various company sites was not intended to suggest that this was where the Claimant would be employed, in view of the previous lack of communication regarding transfer and the tone of the emails from Mr McNulty, I find that the Claimant interpreted this as further undermining his position and causing him to feel undervalued. The email from Peter Horner dated 15/4/21 offering a position as security guard, together with the short notice shift work offered at various locations further distressed the Claimant. I accept that this was the final straw for the Claimant and what led to his resignation.

18. I therefore find that there was a fundamental breach of the implied term of trust and confidence by the Respondent and that the Claimant was constructively dismissed. He was entitled to receive notice, which he did not receive. It follows that the Claimant was wrongfully dismissed.

19. The Respondent is ordered to pay to the Claimant the sum of £7500 gross, being the remuneration the Claimant would have received had he received his three months' notice pay.

Employment Judge **C Butcher**
Date 16 February 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 16 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche